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Brief of Porter, Green & Beale for Petitioners.

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IN THE

Supreme Court of the United States.

Filed Nov. 11, 1902.

OCTOBER TERM, A. D. 1902.

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Petitioner,
vs.
SALLIE E. EILLMON,
Respondent.

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

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CHICAGO:
THE GUNTHORP-WARREN PRINTING CO.,
116-118 Randolph Street,
1902.

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STATEMENT OF THE CASE.

On the 13th day of July, 1880, Sallie E. Hillmon filed, on the law side of the Circuit Court of the United States for the District of Kansas, a petition seeking to recover from the Connecticut Mutual Life Insurance Company the sum of $5,000 and interest upon a policy of insurance, not under seal, alleged in said petition to have been issued for her benefit by the insurance company on March 4, 1879, upon the life of John W. Hillmon, her husband. In her petition she further alleged that both she and the insured had fully complied with all of the terms of the policy; that the insured had died on the 17th day of March, 1879; that due proofs of death had been forwarded to the company, and that the company refused payment of the policy. (*Rec.*, 3-5.)

In defense to the action the insurance company answered (by an amended answer), as follows:

> "1st. The defendant, the Connecticut Mutual Life Insurance Company, for its first defense represents and shows to the court that it denies all and singular the allegations and averments contained and set forth in said plaintiff's petition, filed herein.
>
> 2nd. Said defendant further answering, says that on and before the 30th day of November, A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons to the defendant unknown, unlawfully and fraudulently confederating, conspiring, contriving and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillmon, to-wit, in the New York Life Insurance Company, by its policy numbered 134,418 and dated November 30th, 1878, for the sum of ten thou-

sand dollars; in the Mutual Life Insurance Company of New York, by its policy numbered 195,132 and dated Dec. 10th, 1878, for the sum of ten thousand dollars; and in the Connecticut Mutual Life Insurance Company, by its policy numbered 153,614 and dated March 4th, 1881, for the sum of five thousand dollars.

That thereafter and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin did falsely and fraudulently pretend and represent unto this defendant and others that said Hilmon was dead, and did, on or about the months of March and April, A. D. 1879, and thereafter, for the purpose of securing the payment of said policies and obtaining the money thereon, falsely and fraudulently claim, pretend and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the said John W. Hillmon; whereas said John W. Hillmon was not and is not dead; that since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consummating the conspiracy entered into as aforesaid.

That no premium or payment of any kind has ever been made on or on acount of said policy, and that said policy is void.

3rd. Said defendant, further answering, says that on or about the .... day of ....., A. D. 1879, a dispute, difference and controversy subsisted between said plaintiff and defendant in this, to wit, said plaintiff claimed that one John W. Hillmon, the person mentioned in the policy of insurance, set forth in said plaintiff's petition, died near Medicine Lodge, in Barbour County, State of Kansas, on or about the .... day of ....., A. D. 1879, from a gunshot wound then and there accidentally discharged by one John S. Brown and that by reason thereof a cause of action had accrued to her, this plaintiff; while the said defendant denied that the said John W. Hillmon was dead and that any cause of action had accrued to said plaintiff.

That for the purpose of ending said dispute and con-

troversy said plaintiff for a good and valuable consideration to her by said defendant paid, made, executed and delivered to said defendant her certain release and satisfaction in writing, of which the following is a true copy, to wit:

'LEAVENWORTH, Kansas, Sept. 15, 1879.

In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the Connecticut Mutual Life Insurance Company by reason of policy No. 153614, issued by said Company, dated March 4, 1881, and for the sum of five thousand dollars, on the life of my husband, John W. Hillmon, and hereby enter satisfaction in full and order the dismissal of any and all suits or proceedings commenced or that hereafter may be commenced, by any person in my behalf, for the collection of the same.

(Signed) SALLIE E. HILLMON.

Attest:
W. J. BUCHAN,
JOHN H. BROWN.'

Wherefore defendant asks judgment that said policy be declared null and void," etc.

The plaintiff, in reply, denied the allegations in the amended answer, and charged that the release above pleaded had been obtained by fraud and without consideration, and was void.

On November 30th and December 10th, respectively, 1878, the New York Life Insurance Company issued two policies of insurance for $5,000 each, and on December 10th, 1878, the Mutual Life Insurance Company of New York issued a policy of insurance for $10,000,—all upon the life of said John W. Hillmon, and all being made payable to respondent as beneficiary. At the time of the institution of this action the respondent also began separate actions at law in the same court against each of the other two insurance

companies to recover upon the policies respectively issued by them. On the 14th of June, 1882, an order was entered in each of the three actions consolidating them for trial. (*Rec.*, 25.) Two trials of the consolidated causes resulted in disagreements by the jury. On the 29th day of February, 1888, judgments in each were rendered for respondent, which upon writs of error were reversed by this court, and the cases were remanded for new trial. (145 U. S., 285.) After two more trials of the consolidated causes, each resulting in a disagreement by the jury, a compromise was effected between respondent and the New York Life Insurance Company, which was followed by a dismissal of the suit against that company. (*Rec.*, 61.) Thereafter, on the 16th day of October, 1899, an order previously entered consolidating the two remaining suits for trial was continued in force over the objection of each defendant (*Rec.*, 70), and the consolidated causes again came on for trial, resulting in separate judgments November 18th, 1899, for respondent against the Mutual Life Insurance Company of New York, and against petitioner. To reverse this latter judgment petitioner sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit, and upon a hearing in that court before Judges CALDWELL, SANBORN and THAYER the judgment against petitioner for $11,034 was, on the 2nd day of April, 1901, affirmed, Judge SANBORN rendering a dissenting opinion. (*Rec.*, 2018.) The Mutual Life Insurance Company of New York sued out a similar writ of error, but compromised and settled its case before any hearing in the Circuit Court of Appeals.

Before each and every trial the several defendants asked that the order of consolidation might be set aside, and that the cases might be tried separately, but all these applications were denied and exceptions were duly taken. After

the three causes had already been tried five times, before five different judges, respondent and the New York Life Insurance Company effected a settlement out of court, and a stipulation was made (*Rec.*, 69) between the defendants in the other two cases and the respondent that the order of consolidation theretofore made should be set aside, and that each defendant should be entitled to have and should have a separate trial. Upon the ground, among others, of this stipulation, petitioner renewed its application for a vacation of the order consolidating the cases, but this application was again refused, the order of consolidation was renewed (*Rec.*, 70 and 135), and the impaneling of a jury proceeded, petitioner excepting.

During the impaneling of the jury, when twelve men had taken their seats in the jury box, the Circuit Court said: "It is my opinion that the plaintiff has six peremptory challenges, and each of the defendants three" (*Rec.*, 136), to which statement and ruling of the court the defendants and each of them duly excepted.

There being two cases, respondent thereupon demanded and was allowed to exercise over the objection of each defendant six peremptory challenges to the one single jury, while the defendant in each case was allowed but three, so that petitioner was compelled to try its separate case before a jury to which it was given the right of but three peremptory challenges, while respondent was given the right of six peremptory challenges to the same jury. To the rulings of the court in allowing six peremptory challenges to respondent exceptions were duly taken, and they are also the subject of specific assignments of error.

At the trial, which occupied a month, the two insurance companies remaining defendants contended and adduced

evidence to show that the body of the person who came to his death in the camp at Crooked Creek on the evening of March 17, 1879, which was claimed by respondent to be the body of her husband, was not the body of John W. Hillmon; that Hillmon, John H. Brown and Levi Baldwin confederated together for the purpose of defrauding the insurance companies by procuring insurance upon the life of Hillmon, and by falsely pretending that Hillmon was dead and that this dead body was his, and by demanding payment of the policies, although in fact Hillmon was still alive after the alleged date of his death; and that the claims of respondent against the insurance companies had been completely released and extinguished.

There was conflict in the evidence, as was to be expected, particularly on the question of identity submitted to the jury. There was also some remarkable testimony. For instance, in the deposition of Hezekiah Covey, a teamster, taken for the fourth trial in 1895,—Covey himself not being within the jurisdiction of the court at the last trial,—he told with great particularity how he had examined the body on three different occasions and had recognized it by a certain mole on the back of the left shoulder; yet it curiously appeared that Covey had not even been called as a witness until the second trial of the case, before Mr. Justice Brewer, in 1885; that at this second trial, and at the third trial, in 1888, he had in his testimony made no mention of the mole, or of more than one examination of the body; that until after the third trial he had not even said to respondent's counsel anything about his knowledge of this mole; and that at the third trial, in response to a specific question in cross-examination whether there was any peculiarity about Hillmon by which he could recognize him he had responded, "not particularly; no marks that I knowed of."

(*Rec.*, 264, 301, 1727-1731.) So, likewise, the respondent (now married to a man named Smith, but frequently in the case still called Mrs. Hillmon from convenience and long association) distinguished herself by statements flatly contradicting upon one point or another, or contradicted by, more than a dozen people.*

But eccentricities of testimony like the foregoing are not subject to review in this court, and we have no thought of asking consideration to the weight of the evidence.

The questions presented for argument here relate to the decision of the Circuit Court of Appeals affirming the action of the Circuit Court in consolidating the two

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*Mrs. Geo. A. Nichols (*Rec.*, 1118-19) contradicted by Sallie Smith. (*Rec.*, 1891-2.)

Geo. A. Nichols (*Rec.*, 1137) contradicted by Sallie Smith. (*Rec.*, 1891-2.)

W. W. Nichols (*Rec.*, 1157-8) contradicted by Sallie Smith. (*Rec.*, 1884-5, 828.)

Mrs. Maggie J. Nixon (*Rec.*, 1172-3) contradicted by Sallie Smith. (*Rec.*, 1891-2.)

Samuel D. Nixon (*Rec.*, 1184) contradicted by Sallie Smith. (*Rec.*, 1891-2.)

A. L. Seelig (*Rec.*, 1503-4) contradicted by Sallie Smith. (*Rec.*, 1886, 1892-3.)

G. W. E. Griffith (*Rec.*, 1481) contradicted by Sallie Smith. (*Rec.*, 1886, 1892-3.)

E. B. Good (*Rec.*, 1465-6) contradicted by Sallie Smith. (*Rec.*, 1886-7, 1894.)

O. D. Pickens (*Rec.*, 1473) contradicted by Sallie Smith. (*Rec.*, 1886-7, 1894.)

W. O. Hubbell (*Rec.*, 1595-6) contradicted by Sallie Smith. (*Rec.*, 1886-7, 1894.)

James W. Adams (*Rec.*, 1029-30) contradicted by Sallie Smith. (*Rec.*, 1886-7, 1894.)

Buchan (*Rec.*, 1240-3) contradicted by Sallie Smith. (*Rec.*, 771-2-4, 820.)

Nettles (*Rec.*, 1809-10) contradicted by Sallie Smith. (*Rec.*, 833.)

remaining cases for trial, and in allowing as a result of the consolidation six peremptory challenges to the plaintiff as against three to the defendant Insurance Company, petitioner here; in the admission and the rejection of evidence; in the giving and the refusing of instructions; and in the denial of petitioner's motion to discharge the jury on account of certain remarks made by the court in the presence of the jury during the course of the trial.

Material details of fact not deemed necessary to be set forth in this statement will be found distinctly outlined in connection with the specifications of error relied upon, and more fully presented in the "Argument," *post*.

The Bill of Exceptions.

A preliminary question may possibly be raised in this court on behalf of the respondent in reference to the bill of exceptions (*Rec.*, 129-1926), as it has heretofore been the subject of persistent attack by her counsel. Objections having already been made to it in this court, in opposition to the granting of the writ of *certiorari*, it may properly receive some attention at this point. The record shows exactly what was done. At the conclusion of the trial the two defendants prepared separate bills of exceptions, which were settled and signed in the two causes (*Rec.*, 125, 127), and these bills as settled and allowed were identical in their substance. Both defendants sued out writs of error, and made application to the Circuit Court of Appeals for an order directing that only *one* copy, instead of *two* copies, of these identical bills need be transmitted by the clerk of the Circuit Court, and that such one copy, and also the original exhibits used on the trial and sent up by order of the Circuit Court, should be treated as if actually incorpo-

rated into both records. This was a reasonable application and it was granted. (*Rec.*, 2009-2013.) Although counsel for respondent have made a great outcry over somebody's trivial mistake (we do not know whose), whereby the conclusion of the *copy* of the bill of exceptions in this record (*Rec.*, 1926), reads as if it were the bill actually settled in this case, we are not aware that any one has ever pretended that such was the fact, or that it was anything else than the copy of the bill filed in the other case and used in this one pursuant to the order of the Circuit Court of Appeals. That order merely prevented the useless duplication of a bill of exceptions embracing nearly 1,800 printed pages; it was as proper and lawful upon that subject as it manifestly was in respect to the use of the single set of original exhibits in both cases; and it was conclusive under the circumstances shown.

Anticipating here, also, a continuance of criticisms by counsel for respondent upon the magnitude of this record, a word upon that subject may be justifiable. The record was no larger than was required in the Circuit Court of Appeals for the presentation of the questions taken there for review. It was necessary that the bill of exceptions contain all the evidence and the entire charge of the court in view of repeated decisions of various Circuit Courts of Appeals, and particularly of the Circuit Court of Appeals for the Eighth Circuit. In the case of *City of Milwaukee* v. *Shailer & Schniglau Co.*, 91 Fed., 726 (C. C. A., 7th Circ.), Woods, J., delivering the opinion of the court, said:

> "The first, second, third and fourth specifications of error, which alone are relied upon in the brief for the plaintiff in error, have relation to the admission and exclusion of evidence and to instructions refused and given. . . . An insuperable obstacle to a consideration of any of the questions discussed is that the

bill of exceptions does not purport to contain all the evidence in the case, and clearly does not contain all that was important touching those questions, though it is certified by the judge of the court below that it 'contains all the material evidence offered by either party on the trial.' "

Reference may also be made to the following cases:

U. S. v. *Patrick,* 73 Fed., 800, 806 (8th Circ.).

Lincoln, etc., Safe Deposit Co. v. *Allen,* 82 Fed., 148, 150 (8th Circ.).

Jefferson v. *Burhans,* 85 Fed., 924, 927 (8th Circ.).

Yates v. *U. S.,* 90 Fed., 57, 62 (9th Circ.).

Case v. *Hall,* 94 Fed., 300, 302 (8th Cir.).

Myers v. *Sternheim,* 97 Fed., 625, 626 (9th Cir.).

The entire charge of the Circuit Court was incorporated into the bill of exceptions, by express order of that court. (*Rec.,* 1915.)

SPECIFICATIONS OF ERROR.

Petitioner specifies the following errors of the Circuit Court, affirmed in the Circuit Court of Appeals, which it urges in support of its prayer that the judgment against it should be reversed:

Specification 1.

The court erred in consolidating this cause for trial with the cause entitled *Sallie E. Hillmon* v. *Mutual Life Insurance Company of New York,* in the face of the express stipulation signed by the plaintiff and by all the defendants that the causes should be tried separately.

(Assignments 2 and 3; *Rec.,* 1931-2, 68-70, 133-5.)

Specification 2.

The court in the impaneling of the jury erred in permitting the respondent to exercise more than three peremptory challenges.

(Assignments 4, 5, 6 and 7; *Rec.,* 1932-3, 71-2, 136-7.)

Specification 3.

The court, after a *prima facie* case of conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin had been established, as alleged in the pleadings, and which the court submitted to the jury (*Rec.,* 1921), erred in not permitting petitioner to show by the witnesses E. D. F. Phillips, J. H. Blythe, James S. Crew and Alexander Carr,

the other acts performed and declarations made by the alleged co-conspirators in furtherance of such conspiracy, which would have been shown by the testimony of said witnesses as indicated below. ("A," "B," "C" and "D.")

(Assignment 72; *Rec.*, 1984, 1809.)

A.

The witness Phillips had been called to the house of Levi Baldwin as a physician to re-set a dislocated elbow of Baldwin's son, and after the operation had been performed the conversation set forth in the following answer took place:

> "Q. Now, you may state what the conversation was, so far as it relates to any inquiries he (Levi Baldwin) made of you of the effect of death upon bodies?"

To which the witness Phillips would have replied in substance:

> "He asked me if I had an insurance, and whether I knew about certain insurance companies, whether they were safe or not; he said he had been thinking about taking out some insurance; and in the same conversation, or at the same time, he asked me how long a dead body would—how long a dead body would decompose after it was buried. I said it would depend on whether decomposition had set in before the body was buried or not; and it would depend on the condition of the body when buried. He said, wouldn't—in connection with the conversation of insurance—he said wouldn't it be a good scheme to get a good insurance on your life and go South and get the body of a Greaser and pass it off as your body—wouldn't it be a good scheme to go down South to get the body of a Greaser, or get a large amount of insurance on your life and go down South and get the body of some Greaser and pawn it off as your body and get the money."

"Q. I will ask you this question then: At that time was inquiry made of you by Levi Baldwin in regard to the length of time which would be required for a body to decompose as to become unrecognizable?"

To which the witness Phillips would have answered substantially as set forth in the answer to the preceding question. The testimony was excluded.

(Assignments 64 and 65; *Rec.*, 1978-1982, 1602-7.)

B.

The witness, Blythe, a lawyer and a fire insurance agent at Tonganoxie, testified that he knew John W. Hillmon and Levi Baldwin; that they had called at his office in the fall of 1878 and asked him concerning life insurance, how to get it, what were good companies, how they should make application, whether a person could travel in different countries without forfeiting the insurance, what proceedings were necessary to collect the insurance upon death, what length of time would be required, etc.; that a week or ten days before this conversation he had met Baldwin alone on the street. The conversation set forth in the following answer then took place:

"Q. What was said by Mr. Baldwin on that occasion?"

To which the witness Blythe would have replied:

"Mr. Baldwin on that occasion asked me if I knew anything about life insurance and about the companies; that a friend of his wanted to get some insurance, and he wanted to know if I could recommend some good company to him, and I told him how to do it."

"Q. Did he say a friend?"

To which the witness Blythe would have replied:

"No, sir; not on that occasion. I think the gentleman said it was a relative of his, or connection; I don't know who it was; I didn't know Mr. Hillmon then."

"Q. That was a few days before these parties came to your office?"

To which the witness Blythe would have replied:

"Yes, sir."

The testimony was excluded.

(Assignments 66, 67, 68; *Rec.*, 1982-3, 1612-15.)

C.

The testimony of the witness James S. Crew, all of which was excluded by the court, was substantially as follows:

The witness, aged forty-nine years, was then a resident of Oakland, California; resided in the spring of 1879 in Lawrence, Kansas; was a bookseller, and at the time receiver of the Simpson Bank. Was acquainted with Mrs. Hillmon and knew Levi Baldwin for a long time prior to 1879. As receiver of the Simpson Bank he had two or more notes of Levi Baldwin for collection. They had been then due for some time. Two of the notes were secured by mortgage on real estate and one by chattel mortgage on live stock. Had talked of foreclosing mortgages, and had consultation with Baldwin both at his house and at the bank; had been unable to collect either principal or interest; had had a conversation with Baldwin with reference to how his indebtedness to the bank had arisen; that Baldwin had told him that a part of the money represented by his indebtedness had been furnished to insure the life of John

W. Hillmon; that this conversation took place somewhere between the 20th of February and the 1st of March; that he remembered the circumstance of the reputed death of John W. Hillmon; that he heard of it a few days from the time of his death in the latter part of March; that he had a conversation with Levi Baldwin in regard to the latter's indebtedness to the bank after he had heard of the reputed death of Hillmon; that the conversation took place in the morning in the witness' store; that Baldwin came in hurriedly and told him to let his (Baldwin's) matters rest as he was then on his way west after the body of John W. Hillmon; that he had arranged for a portion of the life insurance on the life of Hillmon, and that as soon as he got it would be able to straighten up all his affairs; that Baldwin stated that he was to have $10,000 of this insurance; that he had acquainted himself thoroughly with Baldwin's financial condition and found him in very straightened circumstances, having quite an amount of property, but all mortgaged and mostly mortgaged twice—first and second mortgages, and that Baldwin's indebtedness was pressing him at this time severely.

(Assignment 69; *Rec.*, 1983, 1607, 1615-17.)

D.

The witness, Alexander Carr, testified that he knew Levi Baldwin and Hillmon; that in March, 1879, he and Baldwin were out together buying stock, something after the 10th of March. The conversation set forth in the following answer then took place:

> "Q. Now you may state, if you please, what conversation, if any, you had with Mr. Baldwin in regard to any business transaction that he and Mr. Hillmon were in."

To which the witness Carr would have replied:

"I had one or two. He was talking to me a couple of times about his and John Hillmon's business—speaking about John Hillmon as much as a couple or three times."

"Q. Now you may state what he (Levi Baldwin) said."

To which the witness Carr would have replied:

"Well, he was talking one day about him and Mr. Hillmon going into a sheep ranch—talking about going into a sheep ranch together; and one day he was speaking about that he was under brogue with John W. Hillmon, and he said he and Hillmon had a scheme under brogue, and he said if that worked out all right that he was all right."

The testimony was excluded.

(Assignments 64 to 72; *Rec.*, 1978-85, 1618-19.)

Evidence of the following facts had previously been developed in the case, and established a *prima facie* case of conspiracy between Hillmon, Baldwin and Brown to rob the insurance companies. (See *Rec.*, 1979-81.)

Levi Baldwin and John W. Hillmon had known one another intimately for eight or ten years prior to 1879. Baldwin had employed Hillmon on his farm and in purchasing cattle for him. During his visits at Lawrence Hillmon generally stopped with Baldwin. John H. Brown accompanied Hillmon on many trips, and was well acquainted with Levi Baldwin. Mrs. Hillmon, then Sallie E. Quinn, was a cousin of Levi Baldwin, worked at his house, and met Hillmon there. (Testimony of Levi Baldwin, Sallie E. Smith, Claude Holliday, William Brown, Henry Clay and Lemuel Evans, *Rec.*, 691-2, 781, 992, 1017-18, 1211-12, 1301-2.) In the fall of 1878 Levi Baldwin was

in embarrassed circumstances financially, and was hard pressed by his creditors. (Testimony of J. H. Blythe, *Rec.,* 1615.) John W. Hillmon married Sallie E. Quinn, October 3rd, 1878. (*Rec.,* 1594.) At this time John W. Hillmon was insolvent, owing McKamy & Anderson about $5,000, and various other parties small sums of money, and he apparently had no assets, except some notes of Levi Baldwin. (*Rec.,* 1389-93, 1399, 1889, 13, 323.) Some time after his marriage he and his wife occupied one room in Mrs. Mary Judson's house, and did their cooking on Mrs. Judson's stove. (*Rec.,* 527, 536.) Levi Baldwin and John W. Hillmon became deeply interested in life insurance. They went to J. H. Blythe, a lawyer and fire insurance agent at Tonganoxie, to whom Baldwin introduced Hillmon, and they asked Blythe various questions about life insurance, what companies were good ones, and how to collect in case of loss. (*Rec.,* 1612-14.) They went to G. W. E. Griffith, a banker at Lawrence and a local agent for the Mutual Life Insurance Company, and questioned him about life insurance. Griffith referred them to Theodore Wiseman, an agent of the same company, and they discussed the subject with Wiseman. Baldwin inquired particularly about insurance, and later said he did not want to take out any policy, but that Hillmon did. An application was made out and a policy ultimately delivered. On February 26th, 1879, in a conversation with Wiseman on the street, Hillmon said he was going West on business [1] might get killed; he asked about proofs of death, what the widow must do in order to obtain her insurance money, and what evidence she would have to furnish if he were killed. Wiseman told Hillmon that if he were killed a coroner's inquest and verdict would be required. (Testimony of G. W. E. Griffith and Theodore Wiseman, *Rec.,* 1479-80,

856-9, 862-3.) Hillmon and Levi Baldwin went together to A. L. Selig, agent for the New York Life Insurance Company, and talked insurance with him. At the suggestion of Selig, Hillmon made application for an accident policy, but on receiving it refused to accept it on the ground that its provisions forbade his carrying firearms while herding cattle. Subsequently he took out a regular life policy. (Testimony of A. L. Selig, *Rec.*, 1496-8.) In conversation with Wiseman, Hillmon stated as a reason for taking out so much insurance that he did it to protect his relatives who had advanced money on stock that he had out West. He also drew Wiseman's attention to the fact that he had been vaccinated as required by the New York Life Insurance Company. (Testimony of Wiseman, *Rec.*, 863.) The total amount of insurance taken out was $25,000, the total annual premiums for which amounted to $600. (*Rec.*, 139, 145, 830.) John W. Hillmon and John H. Brown on their last trip passed through Wichita. While stopping at the Globe Hotel, Hillmon met H. B. Marshall, and finding that Marshall was a horseman, and understood catching wild horses, Hillmon asked Marshall to go out on the range in Western Kansas with them and offered Marshall five or six hundred dollars if he would go, with three hundred dollars down. Marshall refused the offer. (Testimony of H. B. Marshall, *Rec.*, 1403.) They also stopped with two half brothers, Michael Mesh and Ben Helda, at their shanty near Wichita, in the latter part of February, 1879. Hillmon told Mesh that he and Brown were going to buy a ranch, and offered Mesh one hundred dollars if he would accompany them. Returning from town the night before they left, Hillmon said he had been to Lawrence to be vaccinated, and he wanted Mesh to go and get vaccinated also, and then accompany them on the trip.

They offered Mesh $100.00 as a present in addition to his salary. He refused to go. Brown told Helda a similar story, and tried to get Helda to accompany them, saying that they were going into the cattle business and that they had lots of money. He refused to go. (Testimony of Michael Mesh and Ben Helda, *Rec.*, 1560-2, 1574-5.)

The news of Hillmon's alleged death came to Mrs. Hillmon and Levi Baldwin upon his bringing her from his home to Mrs. Judson's house. He and his brother Alva started the next day for Medicine Lodge, where the body was. (*Rec.*, 752, 791-2.) Levi Baldwin stated that he and his brother went there at Mrs. Hillmon's request to see the state of affairs. (*Rec.*, 687.) Alva Baldwin said that they went there for the purpose of bringing the body back to Lawrence, but that on account of the weather they concluded to fence in the grave. They met Brown there. (*Rec.*, 721-2.) They arrived at night and the next morning made their arrangements to fence the grave. (Testimony of Levi Baldwin, *Rec.*, 708.) At the grave the two Baldwins and Brown met representatives of the insurance companies, Walker, Tillinghast and others. The body was exhumed, and upon the cloth being removed from the face Alva Baldwin exclaimed, "Hell, that ain't Hillmon." (Testimony of Wiseman and Tillinghast, *Rec.*, 868, 1584.) At the coroner's inquest at Lawrence, Alva Baldwin was in town, but he was not called by Levi Baldwin or by Mrs. Hillmon to testify, and he never testified or gave his deposition at any trial before the last one. (*Rec.*, 724.)

Upon or near the conclusion of the inquest Brown left Kansas and took up his residence in Missouri. (*Rec.*, 431-4, 489, 492.) In September, 1879, after making written statements, at the request of respondent's counsel, to the effect that the dead body was that of John W. Hillmon, he

made a contrary statement to William J. Buchan, whom his father had employed, confessing that he had lied before, and that this statement to Buchan was the truth. In this statement he in substance said that he and Levi Baldwin and Hillmon had put up a job on the insurance companies to get Hillmon's life insured, and that the intention was that he and Hillmon should go Southwest somewhere and find a body which they could pass off as Hillmon's; that Hillmon was to get the policies and Baldwin was to furnish the money to pay the premiums; that in pursuance of that scheme they left Lawrence and went to Wichita and various other places in the hope of finding a frozen body on the plains, but that they failed to find any body, and Hillmon then returned to Lawrence, while he (Brown) remained at Wichita; that Hillmon came back to Wichita and they started out on another trip; that they overtook a man and asked him to ride with them; that Hillmon had been vaccinated at Lawrence, and he persuaded this fellow to let him (Hillmon) vaccinate him (the stranger) also, taking the virus from his (Hillmon's) own arm; that Hillmon during the trip traded clothes with this man; that one night while this man was lying at the fire Hillmon shot him; that Hillmon then took a valise and started off, saying that his (Hillmon's) name would be Marshall, and that Brown would hear from him from time to time; and that Brown got on his horse and rode to some of the neighbors and told them that he (Brown) had shot his partner, Hillmon, by accident. (Testimony of Buchan. *Rec.*, 1228-31, 1234, 1235.)

John H. Brown also made, signed and swore to a statement in writing, setting forth substantially the above facts. (*Rec.*, 1236-7, 1284-6.)

After making this statement, John H. Brown met Mrs.

Hillmon at Levi Baldwin's house September 12, 1879. He there informed her that he had made such a statement, and that Buchan wanted to make an appointment and see her at Leavenworth. He remained at Baldwin's that night and talked with her at length the next morning with reference to this matter, and she consented to a meeting with Buchan at Leavenworth on Monday. Levi Baldwin was at home during this conversation. On Monday Mrs. Hillmon met Buchan and Brown at Leavenworth, and Buchan told her that Brown had made this contrary statement to the effect that the body was not that of her husband, and that she must get back the policies from her attorneys, and give them up to the companies. She executed releases of the policies, and an order to her attorneys, Wheat & Clough, to deliver them to Buchan. She also accompanied Buchan to the office of her attorneys and demanded the policies. Wheat refused to give them up, claiming to have a lien for $10,000 upon them. On September 25th, 1879, she executed at Wyandotte another release to the New York Life Insurance Company to correct an error in one of the first releases. (Testimony of Brown, Sallie E. Smith and W. J. Buchan, and certain exhibits. *Rec.*, 496, 596, 768-74, 816-26, 830, 1239-1246.)

About the time John W. Hillmon and John H. Brown were in Wichita in the early part of March, 1879, letters were received at Fort Madison, Iowa, from Frederick Adolph Walters, dated at Wichita, by Alvina D. Kasten, Walters' sweetheart, C. R. Walters, his brother, Elizabeth Rieffenach, his sister, and Henry Spreen, a member of his lodge, all of them to the effect that he, Walters, had been hired by a man named John W. Hillmon to accompany him out west on a sheep ranch; that he had been promised large wages, and that he expected to start about March 5th. This

was the last letter or message of any kind received from Walters by his family and friends, and he has never been heard of by them since.

(See the testimony of Alvina D. Kasten, C. R. Walters, Elizabeth Rieffenach and Henry Spreen. *Rec.*, 1687-93, 1698, 1740-42, 1774-6, 1711-14.

Additional facts are set forth in the argument, *post*.

Specification 4.

The court erred in not giving the following instruction, requested by petitioner:

> "No. 36. The jury are instructed that if they believe from the evidence, that before the institution of this suit, the plaintiff had been told and was informed, and was thereby notified that Levi Baldwin, John H. Brown and John W. Hillmon had confederated and conspired together to procure from the defendant insurance companies the policies sued upon in these cases, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured as that of the insured, and of thereby falsely representing the said insured to be dead; and that they had accordingly in fact procured, received and accepted said policies in execution to that extent of the design and purpose aforesaid; and that the dead body presented to the defendants was one procured and presented by said persons conspiring together as aforesaid, and was falsely represented by them to be the body of the insured; then, by the institution of this suit, and by claiming therein the body so presented to be the body of the insured, she thereby availed herself of and adopted and made, in legal effect, her own, all the acts done by the said persons, and each of them, so confederating and conspiring, in aid and furtherance of the matter of said unlawful combination and conspiracy, with like legal effect as to her as if she had been one of the parties originally conspiring.

The court erred in giving to the jury the following portion of its charge:

> "In these cases the defendants allege that John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons unknown, unlawfully conspired together to cheat and defraud the defendants by procuring the insurance policies, by substituting the body of another person, claiming it to be the body of Hillmon, and by thereby obtaining the money upon the policies. The objects of the conspiracy alleged to have been formed contemplate the commission of a crime, that of obtaining money by false and fraudulent pretenses, and it is claimed by the defendants that during the progress of the conspiracy it resulted in the commission of murder. Whoever alleges a conspiracy or fraud, whether as a cause of action or as a defense against the cause of action of another, is required to be definite and precise, not only in the description of the conspiracy or fraud charged, but also in respect to the persons sought to be held as conspirators or participators in the fraud, especially if they are parties to the suit in which the charge is made. In these cases, although it was known that the policies of insurance were made payable to Sallie E. Hillmon, and that no one else could obtain the money thereon without her act and consent, there is no allegation in the answers of the defendants that she was either a party to the alleged conspiracy or participated therein at any time or had any knowledge thereof. Consequently it cannot be claimed in this case that she was a party to an alleged conspiracy or had any guilty participation therein or knowledge thereof."

(Assignments 87, 91; *Rec.*, 1997, 1999.)

For relevancy, see statement annexed to specification 3, *supra*.

SPECIFICATION 5.

The court erred in not giving the following instruction requested by petitioner:

> "No. 37. The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued upon in this case for the purpose of, and with the intent to defraud the said defendants by procuring and presenting to the said defendants a dead body of another person than the insured, representing the same to be that of said John W. Hillmon, thereby pretending to the defendant that said insured was dead, though still living, and that they procured and accepted the said policies in pursuance and in furtherance of said unlawful scheme, and that thereafter while engaged in the prosecution of said unlawful scheme, the said John W. Hillmon actually came to his death; then the jury are instructed that no right of action against the defendants accrued and no action can lie on the said policies, even though the dead body actually presented to the defendants was really that of the said John W. Hillmon."

The court erred in giving the following portion of its charge to the jury:

> "On the other hand, even if you should find that there was a conspiracy between the three men, as charged by the defendants, but should also find that Hillmon died in March, 1879, and that it was his body that was brought to Lawrence as I have stated, your verdict in such events would be for the plaintiff and against the defendants. In other words, the existence or non-existence of the conspiracy is not the controlling question in this case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you may deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon,

it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse."

(Assignment 88, 92; *Rec.*, 1997, 1999.)

For relevancy, see statement annexed to specification 3, *supra*.

SPECIFICATION 6.

The court erred in not giving the following instructions, and each of them, requested by petitioner:

"No. 38. The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued upon in this case, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured, as that of the insured, and of thereby falsely representing said insured to be dead; and that they did accordingly, in fact, procure, receive and accept said policies in execution to that extent of the design and purpose aforesaid; then and in such case the said contracts of insurance, so fraudulently and with such fraudulent intent procured and received, were never valid, but were void, and never attached to the life of John W. Hillmon, and no right of action can be founded thereon in this case, and the jury must find for the defendants."

"No. 47. The jury are instructed that if they believe from the evidence that the issuance of the policy of insurance by the defendant, the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, upon the life of John W. Hillmon was fraudulently procured by the said Hillmon alone, or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown, then such policy is absolutely null and void, and they are to find for the defendant."

(Assignments 89, 106. *Rec.*, 1998, 2006.)

For relevancy, see statement annexed to specification 3, *supra*.

SPECIFICATION 7.

The court erred in permitting the witnesses Reuben Brown and J. W. Green to answer the following questions propounded by respondent for the purpose of attempting to impeach for fraud and want of consideration the release executed by respondent of claims under the policy issued by petitioner:

"Q. You may go on and state what conversation you had with Mr. Buchan at that time?"

To which the witness Reuben Brown replied:

"A. I found Mr. Buchan in his office, and he wanted to know if I knew where John were; I told him that I did not, but I thought I could find him. He wanted I should go and look him up; he said he had got himself into a bad scrape and my father and brother had employed him for his attorney, and he wanted to do all he could for John and wanted I should go and hunt him up immediately."

(Assignment, 27; *Rec.*, 1945-6, 546.)

"Q. You may state, if you know, who employed attorneys, if anybody, at Lawrence for the insurance companies?"

To which the witness Green replied:

"A. Mr. Alton, of the Connecticut Mutual, employed myself, and one Dr. Carney employed Mr. Barker and myself for the New York Life. I don't know who employed Mr. Barker for the Mutual Life."

(Assignment 28; *Rec.*, 1946, 576.)

"Q. I will ask you what was the subject of your interview with him (Munn) in July, and state whether it had any connection with this Hillmon matter?"

To which the witness Green replied:

"A. Among other things, we discussed this Hillmon matter."

(Assignment 29; *Rec.*, 1946, 577.)

"Q. Now, I will ask you to state what conversation you had with Mr. Buchan there on that occasion?"

To which the witness Green replied:

"A. Mr. Buchan came to the office and, among other things, he proposed or thought he could get up the policies which had been issued on the life of John W. Hillmon."

(Assignment 30; *Rec.*, 1946, 578.)

"Q. Now then, I will get you to state to the jury what conversation there was at that time between you and Mr. Munn and Mr. Buchan as to the giving him this kind of an instrument." (Referring to the Munn paper marked Exhibit 15.)

To which the witness Green replied:

"A. I do not at this late day presume to state the exact words which were used at that time, but as I stated before, Mr. Buchan proposed that he could get up the policies which had been issued by the companies on the life of Hillmon. I remember stating myself in substance I did not believe he could do any such thing, and he thought he could and wanted an opportunity to try. Mr. Munn told him that he might go ahead and try to get the policies up if he could, and if he could, that he would pay his expenses anyhow, and if he could get the policies up he would pay him liberally for so doing. Mr. Buchan then wanted authority from Mr. Munn to pay the plaintiff, Mrs. Hillmon, something for delivering up the policies. Mr. Munn refused, and said that the companies would not pay a dollar; that they believed the whole scheme was a fraud, and consequently that they would not pay a dollar for these releases, and went further and said that Mr. Buchan should not go so far as to pay any of the compensation which might be given him, or which he might receive in payment, to Mrs.

Hillmon for delivering up the policies. That was substantially the conversation, a portion of it, possibly, in the words."

(Assignment 32; *Rec.*, 1948, 580-1.)

The court erred in permitting respondent to offer in evidence the following document, marked Exhibit 15, and commonly known as the Munn paper:

"The undersigned attorney, representing the Mutual Life Insurance Company of New York, The New York Life Insurance Company of New York and the Connecticut Mutual Life Insurance Company, hereby stipulate and agree, so far as said companies are concerned, to desist from any further suit and prosecution of John W. Hillmon, John H. Brown, or any other parties in connection with the Hillmon cases, provided the respective policies are surrendered and order for their delivery executed, and all claims under the same released to said companies by said Sallie E. Hillmon, wife of John W. Hillmon, and beneficiary under said policies, and in so doing represent their officers and agents everywhere.
Lawrence, Kansas, September 6, 1879.

H. B. MUNN."

(Assignments 31 & 59; *Rec.*, 1947, 1955-8, 580, 835.)

Munn and Buchan were instrumental in procuring from respondent the releases of her claims upon the policies issued by petitioner, by the Mutual Life Insurance Company, and by the New York Life Insurance Company upon Hillmon's life. The release was a contract executed by respondent in Kansas. Section 6, of chapter 114, of the General Statutes of Kansas, 1892, provides:

"All contracts in writing, signed by the party bound thereby, or by his authorized agent or attorney, shall import a consideration."

By force of this statutory provision the release had the common law effect of a sealed instrument.

The foregoing questions were propounded and the document referred to was offered by respondent with the avowed object of impeaching for fraud and want of consideration these releases, which were subsequently offered in evidence by her. (*Rec.*, 546, 575-581, 585.)

Specification 8.

The court erred in not giving the following instruction requested by petitioner:

> "No. 44. The jury are instructed that the statement signed and sworn to by John H. Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness."
>
> (Assignment 105; *Rec.*, 2006.)

Instead of giving such instruction the court instructed the jury that Brown's statement signed and sworn to by him was not affirmative evidence of the truth of any matter therein contained or mentioned, and that it should not be considered by the jury excepting as affecting the credibility of the evidence of Brown in his deposition. (*Rec.*, 1923.)

The statement in question was made by Brown at Parkville, Missouri, September 4, 1879, and was offered in evidence by respondent. (*Rec.*, 1284-6.)

SPECIFICATION 9.

The court erred in not permitting petitioner to show by the witness W. N. McKamy, as one motive for Hillmon's disappearance and continued absence, that Hillmon had committed a crime in Texas in the spring of 1878, and in not permitting petitioner to read to the jury in connection with such showing the article of the Criminal Code of Texas relating to such crime, and in not giving the instructions requested by petitioner and hereinafter, in this specification, set forth.

The witness McKamy testified that at Fort Griffin, Texas, he had sold in the spring of 1878 upon credit to Hillmon and Brown a train of oxen and wagons for $3,623.90; that he had taken in payment therefor their notes, one for $900 and two for $1,361.95 each, secured by a chattel mortgage upon the oxen and wagons. (1389-1394.) The witness John H. Brown had already testified as to the purchase of the train from McKamy and that Hillmon had disposed of it at the places mentioned. (*Rec.*, 372-6.) William Hillmon had also testified in respect to it. (1097.) William Brockelsby had testified that as city marshal of Lawrence in the fall of 1878 his attention had been particularly called to Hillmon by a communication from parties at Fort Griffin, Texas. The court refused to allow petitioner to show an enclosure in that letter. (1007.) The Texas statute severely penalized a chattel mortgagor who took mortgaged property outside of the state or sold it with intent to defraud creditors. (*Rec.*, 1400.) Respondent contended at the trial below, and at her request the court instructed the jury, that the continued absence of Hillmon was evidence of his *death*. (*Rec.*, 1920.)

The following questions were propounded by petitioner to the witness McKamy:

"Q. What did Hillmon and Brown do with the oxen and wagons which they purchased from you, if you know?"

To which the witness would have replied:

"About two months after I had furnished Hillmon and Brown with these supplies I learned that they were pulling out with the teams for the Pecos river, with the intention of beating me out of these teams and supplies. The boy came into the Pease River store and told my clerk immediately that Hillmon and Brown were pulling to the other side of the plains; that one of the drivers of Hillmon and Brown had told him to leave word at the Pease River store that Hillmon and Brown were pulling to the other side of the plains with the oxen, wagons, and supplies, with the intention of beating me out of them, and that the drivers were virtually their prisoners, as they had threatened to kill any one of them who attempted to leave them or give them away."

(Assignment 61; *Rec.*, 1965, 1394.)

"Q. What, if anything, did you do towards attempting to recover these oxen and wagons?"

To which the witness would have replied:

"As soon as I heard of their running away I wrote to the chief of police at Lawrence, Kansas, to look out for them there, knowing that Hillmon was corresponding with a young lady there, and I figured that he would go there. Then I went to my Pease River store and struck out on the trail, and followed the trail to near the Pecos river. It then became evident to me that they were going up the Pecos river, and I then left the trail and went up to Las Vegas, New Mexico. At Las Vegas I received notice from the chief of police at Lawrence that the men were there, and also found a load of supplies that I had furnished them at my Pecos River store in the possession of a person to whom they had sold them. I also learned that they had traded off a portion of the oxen at Las Vegas, New Mexico, for a span of horses. I went up to Trinidad, Colorado, and on the road to Trinidad I found four yoke of the cattle which they had sold to a man who was working on the claim of the Atchison, Topeka and

Santa Fe Railroad. At Trinidad I learned that they had sold the oxen and wagons in every direction. I stopped at Trinidad, Colorado, and wrote down to Texas to have papers sent to me at Trinidad, so as to have Hillmon and Brown arrested in Kansas. Before the papers reached me I read a notice in the papers of the killing of John W. Hillmon in Barber County, Kansas, and presuming that this was correct, I returned to Texas."

(Assignment, 62; *Rec.*, 1966, 1395.)

Article 797 of the Criminal Code of the State of Texas, which plaintiff in error offered to read to the jury in connection with the testimony of W. N. McKamy, is as follows:

"Article 950 (797). Fraudulent disposition of mortgaged property. If any person has given, or shall hereafter give any mortgage deed or trust or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the state, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

(Assignment 63; *Rec.*, 1967, 1400.)

The court should have given the following instructions, and each of them, requested by petitioner:

"No. 41. If you believe that John W. Hillmon sold or disposed of mortgaged chattel property in such manner, in 1878, as to be guilty of a crime in Texas, punishable with imprisonment in the penitentiary, you are then at liberty to consider the probability that such a crime would tend to induce him to disappear or to go to unknown parts or conceal himself, and this tendency you may further consider in your deliberations as to whether the body found at Crooked Creek was the body of Hillmon."

"No. 42. You are instructed that by the laws of

the State of Texas in the year 1878, it was provided that if any person had given a mortgage in writing upon any personal or movable property, and should, during the existence of such chattel mortgage, remove the said property out of the state, or dispose of the same with intent to defraud the person having such lien; such act or acts would be criminal and the person found guilty thereof would be subject to imprisonment in the penitentiary of Texas for a term of not less than two nor more than five years."

(Assignments 103, 104; *Rec.*, 2005.)

SPECIFICATION 10.

The court erred in not giving the following instruction requested by petitioner:

"No. 28. The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case, for the reason that the real question in this case is, whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gunshot wound at the hands of one John H. Brown, at Barber County, on the 17th day of March, 1879."

(Assignment 99; *Rec.*, 2003.)

The court refused to give this instruction, and instead thereof in its charge instructed the jury on the same point as follows:

"As bearing upon the question whether John W. Hillmon died as claimed by the plaintiff and whether it was his corpse that was brought to Lawrence, you are entitled to consider the fact, if it be one, that he has not been seen or heard from alive since the 17th or 18th day of March, 1879, at which time it is claimed he was killed. The unexplained absence of a person from his home and friends without being heard from, if continued for a sufficient length of time, may become evidence tending to show that he is dead, and it may be taken in connection with other evidence tend-

ing to show that he died at a certain time and place. For some purposes, such as the settlement of estates and the like, the law adopts the presumption that an unexplained absence of seven years without tidings being received from the absent one is evidence of his death. The weight to be given to such continued absence depends upon circumstances. If it appears that a motive may exist for absence and a continuance thereof and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show death." (*Rec.*, 1920.)

The *allegation* of the respondent *in pleading* is that John W. Hillmon met his death from a gunshot wound at the hands of John H. Brown at Barber County, Kansas, on the 17th day of March, 1879, and this action was commenced on July 13, 1880. (*Rec.*, 3, 10, 15.) No lapse of time gave rise at the time the action was brought to *any presumption* on that allegation.

SPECIFICATION 11.

The court erred in not giving the following instruction requested by petitioner:

"In this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon. Proof has been offered, which has not been disputed, that the corpse had a perfect set of teeth, without decay or imperfections. If it appear by a preponderance of evidence that John W. Hillmon in his lifetime had lost a tooth or that any of his teeth were imperfect, then it follows that the body at Lawrence was not the body of John W. Hillmon, but the body of some other person, and if you find from a preponderance of the evidence that John W. Hillmon in his lifetime had lost a tooth or had imperfect teeth, then you will return a verdict for the defendants. In determining the preponderance of

the evidence on this question, if the number of witnesses testifying on this question are persons of equal credibility and standing and with equal means of knowledge, then the party producing the greatest number of witnesses on that question must prevail in this case."

(Assignment 85; *Rec.*, 1996.)

The only mention of the teeth by the court in its charge is found in the record at page 1924, where the court said:

"The act of recognizing between friends and even members of the same family may not depend upon the color of the hair, the condition of the teeth, the size or shape of the nose, or any independent feature."

A model of the cadaver's teeth was made by Dr. Patterson and was offered in evidence as an exhibit.

The following witnesses examined the cadaver and testified substantially in effect that the teeth were remarkably good, very strong and unusually large and with no fillings and not decayed: Dr. Patterson (244); Dr. J. H. Stewart (925, 928, 940); Dr. V. G. Miller (1311); Claude Holliday (998); Dr. William W. Howe (1384). No other witnesses testified concerning the character of the cadaver's teeth.

The following witnesses testified substantially that Hillmon's teeth were imperfect, and that one was either missing or decayed, the witnesses differing in their remembrance as to the location of the missing tooth: Theodore Wiseman (860-1, 882, 901); Claude Holliday (994, 997); Joseph Bebout (1001, 1004-5); James Cameron (1023, 1025); Tinetta Corcadell (1036, 1038); E. Summerfelt (1046, 1048-9); Eleanor Faxon (1083); Henry Hillmon, brother of John W. (1094); William Hillmon, another brother (1095-7, 1107-9); Mrs. George A. Nichols, sister of John W. Hillmon (1117, 1120-3); George A. Nichols (1134-8,

1141); Mrs. Maggie J. Nixon (1171-2); Thomas J. Schleppy (1180); Dr. William W. Howe (1379); H. B. Marshall (1401); Samuel Walker (1065).

The following witnesses testified that John W. Hillmon had good teeth, or at least they never noticed that he had a missing tooth; Dr. N. Simmons (215); Arthur Judson (525); Mary Judson (531, 539), and Sallie Smith, formerly Sallie Hillmon, the respondent (748).

SPECIFICATION 12.

The court erred in not permitting the witnesses Mrs. Elizabeth Riffenach and Fannie Walters to answer the following questions:

"Q. Now, what was said and done at the time those pictures were shown to you?" To which the witness would have replied in substance as follows: That the two pictures referred to, marked Exhibits 29 and 30, which were pictures of the cadaver taken as it lay in the coffin, were brought home by the witness' father, Daniel Walters, and were shown to her and her sister, Fannie Walters. That the mother was present at that time, and that before she had seen the pictures their father accidentally dropped one of them on the floor; that while it was being picked up their mother saw it and exclaimed: "Oh, it is my son!" and immediately fell in a swoon.

(Assignments 75, 76 and 84; *Rec.*, 1897-8, 1778, 1795-6.)

The witnesses had previously testified that their mother was dead; that they had last heard from their brother, Frederick Adolph Walters, by letter dated at Wichita March, 1879; that the pictures in question were sent to their father early in January, 1880; that he brought them home,

and that their mother was present when he brought them into the room. (*Rec.*, 1773-8, 1795-8.)

The witness Daniel Walters had testified that after the disappearance of his son in 1879 he had been making inquiries for him at various points, and, among others, through his Lodge to Wichita, Kansas; that as a result of these inquiries he received from the master of the lodge there two photographs of the cadaver above referred to. (*Rec.*, 1620-2, 1630-2.)

The witness Wiseman had testified that upon learning by a letter from Ft. Madison, received by him through Mr. Walker, a Wichita banker, that inquiries were being made from Fort Madison concerning a Frederick Adolph Walters, he had, in December, 1879, sent to the writer at Fort Madison photographs of the cadaver similar to the photographs above referred to. (*Rec.*, 878-880.)

Specification 13.

The court erred in not permitting the following question to be propounded by petitioner to the witness Arthur Simmons for the purpose of testing the character and credibility of the witness:

> "Q. Now, I will ask you if it is not a fact that during the time that he was county attorney you paid him five hundred dollars, or some other amount, to influence his action as county attorney?"

The court erred in not permitting petitioner to prove in the cross-examination of said witness that in Leavenworth County he either testified, stated, or made an affidavit to the effect that either he had influenced or had attempted to influence the official conduct of a public officer of the State of Kansas by using or offering to use money.

The witness had previously testified that he was acquainted with one William H. Dill, who was at one time the county attorney of the county in which witness resided, and as such was engaged in the prosecution of cases there.

In connection with the refusal of the court to permit the witness to answer this question, the record shows the following (*Rec.*, 1878-9):

> "The plaintiff objects to the question as incompetent, irrelevant and immaterial.
>
> "By the Court: You know that is the height of impropriety. The objection is sustained.
>
> "By Barker offered to speak.
>
> "By the Court: I won't listen to it.
>
> "The defendants then and there excepted to the ruling of the court.
>
> "By Mr. Barker: I will submit to the court in writing what I propose to prove.
>
> "2338. By the Court: Nothing along that line will be entertained.
>
> "By Mr. Barker: I will submit in *writing* under the rule of the court at the proper time what we propose to prove by this witness.
>
> "By the Court: If you have anything further in the line of proper cross-examination, proceed.
>
> "Witness excused.
>
> "By the Court: That is so much out of the way of propriety, so much aside from the well recognized principles of law, that I cannot conceive the counsel is acting in good faith in suggesting it.
>
> "By Mr. Barker: I want to say to the court that I am acting in absolutely good faith. I think we have the right to ask him if he has ever been in jail or indicted or anything of that sort. I have in mind a line of cases where a court in New York had held that you had the right to ask a man if he had been in jail.
>
> "By the Court: There is no line of cases reported in the English language that will justify a question of that character, and the counsel ought to know it.
>
> "And thereupon the defendants offered, in writing, to prove on the cross-examination of Arthur Simmons,

that in Leavenworth County he either testified, stated or made an affidavit that he either had or attempted to influence the official conduct of a public officer of the State of Kansas, by the use or offer to use money.

"The court denied the offer; to which action of the court the defendants, and each of them, at the time duly excepted."

(The pressure of time and the great bulk of the record caused petitioner to overlook a definite assignment of error upon this subject. As the court may nevertheless be disposed to consider the error, attention is respectfully called to it.)

SPECIFICATION 14.

The court erred in not sustaining the motion of petitioner to discharge the jury and issue a new *venire*, on account of the following remarks made by the court in the presence of the jury and while the court was in session.

"By the Court: I desire to say this: There is a juror here whose conduct is very commendable, and whom I honor for it, has stated to me that a communication has been made to him, which he interpreted as preliminary to an offer to bribe. He stated to me the language that was used to him, and it looks very much to me as it did to him, but inasmuch as there might be some mistake, I think it best not to mention the name of the party who made the communication, or the name of the juror to whom it was made; but I desire to say this: that if there is any further effort made in that direction, I will have that man's name presented to the United States grand jury for indictment.

By the Court: It is no lawyer connected with this case; I do not mean to say that the effort came from either side of the case, and no counsel is called upon, it is not necessary in the mind of the court for any counsel to say anything one way or the other about it. There is no reflection cast upon any one directly con-

nected with this case, so far as I know, but I desire to say to the person that that must stop; it must proceed no further. If I can prevent it this case will not be tried with anything of that sort in it."

(Assignment 60; *Rec.*, 1958-1965, 76-7, 800-807.)

SPECIFICATION 15.

The court erred in not giving the following instruction requested by petitioner:

"No. 34. The Supreme Court of the United States in the case of *Gregg* v. *Houston*, 104 U. S., 553, speaking through Chief Justice Waite, 'If upon the evidence the jury had brought in a verdict against the defendant, it would have been the duty of the court to set it aside and grant a new trial. It is right, therefore, to direct a verdict for the defendants.' In accordance with the rule of law, which is again enunciated by the same court in the case of *Randall* v. *The B. & O. Rd. Co.*, 109 U. S., 479, being of opinion that it would be my duty in the event of a verdict for the plaintiff to set the same aside, I charge you that you must find a verdict for the defendants."

(Assignment 107; *Rec.*, 2006.)

SPECIFICATION 16.

The court erred in rendering a judgment for the respondent when judgment should have been rendered for the petitioner, according to the law of the land.

(Assignment 108; *Rec.*, 2007.)

BRIEF AND ARGUMENT.

The assignments of error, and particularly those relating to certain evidentiary facts excluded by the court, the admissibility of which depended upon a large group of correlated facts previously in evidence, make necessary some connected history of the occurrences disclosed by this record.

Before the summer of 1878, in the open country some four or five miles to the westward of Tonganoxie (*Rec.*, 1612), in Leavenworth County, Kansas, the accidents of life had thrown into association a group of less than half a dozen persons who all at once became the active figures in the issues with which we are concerned. There, in the region then largely given up to cattle ranges, had lived for several years and since 1872, a man named Levi Baldwin. (*Rec.*, 684, 691.) He had a dwelling, and land of considerable extent, and was reputed to be for the time and region a man of some means and substance. In truth, however, his affairs were involved, and petitioner offered to prove that he was embarrassed and severely pressed by his creditors. (*Rec.*, 1615, 1617.)

Living a considerable part of the time in his family and working there (*Rec.*, 691-2, 781) was a young woman named Sallie E. Quinn. Her mother was a cousin of Baldwin. (*Rec.*, 684, 692.) In 1873 her parents had taken and occupied a farm about three miles distant from that of Baldwin (*Rec.*, 745, 780), but after a few years her mother appears to have been living in the neighboring city of Lawrence. (*Rec.*, 784.) The daughter also lived in Lawrence at times in various capacities; at one time she was taking

in sewing, at another she was a waitress in a hotel, and at another a waitress in a restaurant kept by her brother—never elsewhere heard of—in the fall of 1877. But chiefly she lived and worked in the family of Levi Baldwin. (*Rec.*, 691-2, 784-5, 1217.)

John W. Hillmon in 1871 or 1872 was herding cattle for one Houston in Leavenworth County. While thus employed he lived at Baldwin's house. *Rec.*, 685.) He had previously been in the army during the last six months of the civil war, having enlisted on the 20th of September, 1864, for one year, and having been discharged in October, 1865. (*Rec.*, 1128.) After some time he went to Colorado and passed some years in or about the mines (*Rec.*, 355, 358), and afterwards lived as a cattle herder and as a hunter on the buffalo ranges. (*Rec.*, 1094, 1096.) Returning after a year or two to Baldwin's neighborhood, he seems to have attempted to buy and ship some cattle to Kansas City (*Rec.*, 685), but he presently went off again and resumed his wandering life as a buffalo hunter. (*Rec.*, 343, 363, 366, 686.) In the summer of 1878 he returned again and is found working for Baldwin on his farm. (*Rec.*, 1212.) The character of Hillmon, and the character of his occupation during the intervals of time which he spent at the mines and on the hunting ranges, is more fully exhibited in the history of his companion and associate during those periods, John H. Brown.

This John H. Brown, born at some place in Indiana, appears to have been from boyhood a restless wanderer and adventurer. By 1873 he had found his way into and through Missouri and Kansas, living short periods here and there where he found employment—into Arkansas and Texas, up the Arkansas river into Colorado and the mining regions, dwelling all his life in the camps of the unsettled,

roaming, restless and reckless people that were scattered in mines and on the ranges through the primitive frontier settlements. (*Rec.*, 349-354.) About July, 1874, he came into association with John W. Hillmon, who then appears to have been a foreman in certain mines. (*Rec.*, 355-6.) In September or October, 1874, he and Hillmon went together to Central City, Colorado, and remained there in the mines until the early summer of 1875. (*Rec.*, 359.) In 1876 he came back alone to Wyandotte County and presently fell in with Hillmon again at the railway station in Kansas City in the spring of 1876. (*Rec.*, 360.) He and Hillmon went together the same day to Lawrence, where they stayed several days, and then he went with Hillmon to Levi Baldwin's, where he first made the acquaintance of Baldwin. (*Rec.*, 361, 694.) At thi time he made an arrangement with Hillmon for an expedition into Texas. He went, as he says, in the employ of Hillmon, without definite agreement as to wages, but to hunt for buffalo and sell their hides. (*Rec.*, 363.) The next year found them in Texas on the Brazos river. (*Rec.*, 366.) In the spring of 1878 they are found at Fort Griffin, dealing with McKamy and Anderson, from whom they purchased a cattle train, consisting of eleven wagons and thirty-two yoke of oxen, and for which they gave their notes and a mortgage upon the property. This cattle train they immediately proceeded to run out of Texas into New Mexico and Colorado, selling portions of it here and there as they went. (*Rec.*, 369-381, 1093-1097; 1389-1400.) The last of it appears to have been sold in Pueblo, and Brown received his share of what remained of the money thus obtained and returned to Wyandotte, but very soon went up to Lawrence and there met Hillmon. (*Rec.*, 379.) Brown in his deposition speaks of this expedition as occurring in 1876 and 1877, but it is

quite apparent that he was referring to events of 1877 and 1878. (*Rec.*, 379.) Meanwhile parties from Fort Griffin in Texas were instituting inquiries at Lawrence as to the whereabouts of Hillmon (1007). In this connection petitioner sought to show the nature and subject of these inquiries, and offered to prove that the dealings of Hillmon and Brown with this mortgaged cattle train were a violation of the criminal laws of Texas, and offered in evidence the provisions of the Texas statute upon that subject; but this evidence was excluded by the court, and the statute was not allowed to be read. When Brown rejoined Hillmon at Lawrence they went out together to Levi Baldwin's, so that in the fall of 1878 Hillmon and Brown and Levi Baldwin (*Rec.*, 376-8, 695, 1212) were together and in close association again.

At this time, as has been said, Baldwin was financially embarrassed and was being pressed by his creditors. All at once it appears that he became deeply reflective and curious upon the subject of life insurance.

Upon this subject there is a large amount of evidence in the record, and an equally large amount of the greatest significance which was excluded by the court. In 1878 he appeared at the office of an attorney, Mr. Blythe, in Tonganoxie, consulting Blythe about life insurance. He had Hillmon with him, whom he introduced to Blythe. (*Rec.*, 1612.) They talked to me a number of times, says Mr. Blythe, about insurance; how to get it and concerning desirable companies, and how application and payments should be made, and whether one might travel in different countries and climates without forfeiture, and various questions of that kind. They asked what proceedings might be necessary to collect insurance, and what time it would take. Mr. Baldwin asked more "pertinent" questions, says Mr.

Blythe, than he would expect an ordinary man to ask; but Baldwin "was not an ordinary man." He had previously talked with Blythe alone upon this subject of life insurance, but the conversations between them alone were excluded by the court. (*Rec.*, 1613.) Subsequently he appeared actively with Hillmon in applying for and procuring the several policies of insurance for Hillmon. (*Rec.*, 857, 859, 1479, 1497.) As a result, policies of life insurance to the amount of twenty-five thousand dollars were taken out on the life of Hillmon, ten thousand in the New York Life, ten thousand in the Mutual Life, and five thousand in the Connecticut Mutual. (*Rec.*, 139, 145, 1498, 830.) On the 3rd of October, 1878, a marriage of Hillmon to Sallie Quinn, the relative of Levi Baldwin, made her available as a beneficiary in the policies. On this occasion there were present only her mother and sister, two members of the family in which she boarded at the time, and Levi Baldwin with his wife and daughter. No friends or acquaintances of Hillmon were advised of or anticipated this marriage, and no notification of it was given to his sisters and other relatives living but a few miles away. (*Rec.*, 787.) One naturally wonders at the disproportionate amount of this insurance for a man in Hillmon's circumstances. As a provision for his wife it far outran anything which she or any member of her family or of his had ever experienced. He was a man in absolute poverty, utterly insolvent, without business or resources. (*Rec.*, 536, 1393.) A little more than a year after his disappearance his wife made an affidavit that she was unable to give security for costs in this action because of her poverty. (*Rec.*, 12-13.) So large an insurance could hardly have been intended for a permanent provision, for annual premiums aggregating six hundred dollars or more (*Rec.*, 139, 145,

830) were far more than Hillmon could carry, and it serves to indicate rather some immediate and temporary purpose that could be answered by raising money enough for a single premium.

The court excluded a large amount of testimony pertinent in this connection and relevant to the defenses interposed. For example, to show acts of Levi Baldwin to be taken in connection with other independent circumstances, and with acts of other persons, to prove that he and Hillmon and Brown were acting together in the execution of a common purpose, petitioner offered (*Rec.*, 1809) to prove the following facts shown by the testimony and depositions of the same witnesses on former trials of this case:

That Levi Baldwin had a conversation with Dr. Phillips in October, 1878, in which Baldwin said he was thinking of taking out some insurance, and asked if certain insurance companies were safe; and how long it would take before a dead body would decompose after it was buried, and said, "wouldn't it be a good scheme to get a large amount of insurance on your life and go down south and get the body of some 'greaser' and palm it off as your body and get the money?" (*Rec.*, 1606.)

That Levi Baldwin had a conversation with J. H. Blythe, an insurance agent, in which Baldwin asked him about life insurance, saying that a relative or connection of his wanted to get some insurance and wanted Blythe to recommend some good company to him. The court had already permitted respondent to show by the same witness a conversation between Baldwin, Hillmon and the witness upon the same subject a few days later. (*Rec.*, 1613.)

That Levi Baldwin, in the latter part of February, 1879, had a conversation with James S. Crew, who, as receiver

of the Simpson Bank, held for collection some notes past due against Baldwin, two of which were secured by mortgage on real estate and one by chattel mortgage on live stock. During this conversation Baldwin said that a part of the money represented by this indebtedness had been furnished to insure Hillmon's life. Crew further testified that he had heard of Hillmon's death in the latter part of March, and that shortly thereafter Baldwin came in hurriedly and told him to let his matter rest as he was then on his way west after Hillmon's body, and that he had arranged for a portion of the life insurance on Hillmon's life, and that as soon as he got it he would be able to straighten up all his affairs; that he was to have $10,000 of the insurance money. (*Rec.*, 1616-17.)

That shortly after the 10th of March, Levi Baldwin had a conversation with Alexander Carr, during the course of which Baldwin said that "he and Hillmon had a scheme under brogue, and he said that if that worked out all right that he was all right." (*Rec.*, 1619.) All this offered evidence was excluded.

In this connection a special insistance of petitioner became the ground of instructions which were asked and refused, and of specific assignments of errors. An insuperable accumulation of evidence proved the combination and conspiracy for imposture and fraud through the instrumentality of these policies of insurance, which was disclosed by Brown in his statement at Lexington, and which is pleaded in defense. On this subject the same rules of evidence which apply between co-conspirators in establishing such a combination are equally applicable as to respondent, whether she may be deemed under the pleadings a co-conspirator or not, for in this suit she has appropriated and availed herself of all they have done, and with perfect

knowledge of their guilt, has adopted all their acts and assumed the prosecution of their scheme. She became subject to the rules of evidence which apply against them and between them to the same extent as if she had been charged as a participant in the original scheme of fraud and conspiracy with them.

This business of arranging for the insurance occupied these parties until December came. The premiums for six months were paid. During all this time Hillmon and Brown were in communication with each other, and from time to time with Levi Baldwin. (*Rec.*, 377-8, 384-5, 686, 695, 701, 787-8, 1212.) On the 17th of December, a few days after the policies in the New York Life and in the Mutual Life had been issued, Hillmon appeared at the office of Dr. Miller, the examiner, to correct a mistake in his declaration as to his height (*Rec.*, 1308), and immediately after this and before Christmas he and John H. Brown went off together again upon an expedition into Southwestern Kansas. Brown testified that the object of the expedition was to locate and procure, and he said, "to open up a cattle ranch" (*Rec.*, 343), and that he went under a contract of employment by Hillmon for wages that were left undetermined. Going by rail to Wichita they went from there in a wagon, pursuing a wintry journey over the plains to Medicine Lodge, Sun City, Kinsley and Larned on the Santa Fe Railroad, thence to Big Bend and to Hutchinson, returning to Wichita, where they arrived about the 18th or 20th of January. (*Rec.*, 343, 344, 386, 387.) On its face it appears to have been an aimless drifting through the country in the cold and snows of winter—a purposeless wandering from place to place—returning to Wichita, whence they started. The alleged purpose, "to open up a cattle ranch," is discredited by all the circum-

stances of the time. Neither Hillmon nor Brown had any capital for opening up a cattle ranch, nor the means to put any animals upon a ranch if they had one. The extremely impecunious condition of Hillmon is shown by the narrow circumstances under which he was living at the time of his marriage and departure, for the *res angustae domi* were never more vividly illustrated; also by his state of affairs at the time of his alleged decease, when nothing remained for the respondent but these policies of insurance; and by her own affidavits as to her complete destitution. (*Rec.*, 536, 323, 13.) Learning after his return to Wichita that without vaccination certain of the policies could not be issued, he returned to Lawrence, where he was vaccinated (*Rec.*, 863, 917-18, 1499-1500), and after the effectiveness of that operation became assured he rejoined Brown, during the latter half of February, at Wichita, where Brown had remained. While there neither he nor Brown was engaged in any business, and they seemed to be idling their time away "throwing coppers" and playing "crack loo." (*Rec.*, 391, 1426.) It develops, however, that what really engaged them was a quest for some one to go out with them on their projected expedition. Hillmon seems to have made during this interim while Brown waited at Wichita two visits to Lawrence. He arrived there the first time on the 25th of January and returned after two or three days. (*Rec.*, 389, 391, 749.) He went again to Lawrence on the 14th of February and after vaccination, as has been stated, rejoined Brown at Wichita. During each of these visits he had meetings with Baldwin. (*Rec.*, 702-3.) Upon the second one he was very curious as to what evidence his widow would have to furnish, if he were killed, and Wiseman told him a coroner's inquest would be necessary and a verdict of a coroner's jury. (*Rec.*, 862-3.)

Some singular preparations which were made for these winter journeys over the plains become conspicuous in the lights which subsequently fell upon them. During one of these returns to Lawrence he made an exchange of clothes with Levi Baldwin. He exchanged a very dark coat and vest, probably black, for a rough coat and vest, a striking pattern having large plaids. He and Baldwin were similar in form and size, for his coat and vest fitted Baldwin well and Baldwin wore them out. (*Rec.*, 703-5.) He bought a book and opened a diary which he kept for a few weeks during his first expedition into Southwestern Kansas. There is no suggestion of his ever having kept a diary before, and this one is opened and closed, rounded up, dated and signed, as if begun, prepared and ended for a special purpose. The initial and final clauses seem remarkable. They are (*Rec.*, 1327):

> "John W. Hillmon's Book. Residence, Lawrence, Kansas. Mrs. S. E. Hillmon, corner Henry and Alabam St., Lawrence, Kan. Travelling companion, J. H. Brown: Residence, Wyandotte, Kan.
>
> "My first memorandum I lost after I had been out a few days, so I replaced it with a new one. Could not recall all that I had in my first, but placed my dates correct."

He then went on to account for each day's happenings from December 18, 1878, to February 23, 1879, when he closed thus (*Rec.*, 1334):

> "I don't see as there is any good to grow out of me trying to keep track of my misdeeds. While I am as apt to err as any one and that I would be sure not to make a memorandum of and only show up the best parts as others have done before me, I do not want to be an exception to the rule or make any new ones, so to keep from answering any hard questions if any one would want to know where I spent my evenings I will say I have forgotten to make a memorandum of the

time and my memory is bad as I never charge it with anything and of course cannot answer promptly.

So ends this part at Lawrence.

February 23, '79. J. W. HILLMON."

Furthermore on the 22nd of November, 1878, he had written a letter to his sister, Mrs. Nichols, and her husband, living in Washington County, Kansas. In this letter he for the first time told them that he had been married on the 3rd of October "to a Miss Quinn of Lawrence," and asked them to forward to him his army discharge and other papers as soon as possible, saying, "I want to use some of them." These articles, previously for years put away and abandoned, were sent to him immediately (*Rec.*, 1116, 1127), and with that old diary which had been finished and given up at Lawrence, were burdensomely carried on his person on this journey and were subsequently found upon the person of the man killed at Crooked Creek. (*Rec.*, 419, 587, 595, 602, 606.) This circumstance will inevitably associate itself with the casual observation dropped by Brown in his statement at Lexington and Parkville, that Hillmon hurriedly transferred some book from his own pocket to that of the man who was shot at Crooked Creek. (*Rec.*, 1231, 1286.)

After Hillmon returned the second time from Lawrence, he and Brown went to stay with two men, half-brothers, whom Brown had known for a good many years—Michael Mesh and Ben Helda—who were living then at Wichita in the occupation of gardening. (*Rec.*, 390.) While they were there Hillmon told Michael Mesh that he was going to buy a ranch, and tried to induce Mesh to go in his employ, offering him $100 a month if he would go. The night before they left, Brown and Hillmon renewed their proposal to Mesh. Hillmon had been vaccinated at Lawrence, and they wanted Mesh "to go down and get vaccinated and

they would pay for it," and his compensation should begin from the time they started, and offered him "$100 besides for a present if he would go." (*Rec.*, 1561-2.) Brown also applied to Helda, proposing that he should sell out his interest in the garden and go with them "in the cattle business" (*Rec.*, 1573-5), but these inducements were declined. Similar proposals to others appear in the record. H. B. Marshall, a horse dealer and trainer in Wichita, was asked some time about the first of March, 1879, to accompany them on the range, and Hillmon offered to pay him $300 down, if he would go along and teach him how to catch wild horses. (*Rec.*, 1403.)

But in the early days of March Hillmon and Brown set out into the solitudes of the wilderness upon that final journey, culminating in the crime and tragedy which distinguish the record in this case.

Presently came to Lawrence the report that on the 17th of March Hillmon had been accidently shot but instantly killed by Brown in their evening camp on Crooked Creek beyond Medicine Lodge, in Southwestern Kansas, and that the body had been buried at Medicine Lodge. A singular obscurity is thrown over the receipt of the earliest tidings upon this subject. That extraordinary paralysis or atrophy of memory which sometimes distinguishes witnesses is illustrated in the case of Levi Baldwin. (*Rec.*, 715, 713, 714, 705.) Mrs. Hillmon says that she first got the tidings from Mrs. Judson, the woman who owned the house in which she occupied a room, but where Mrs. Judson got them and how they should have come first to her of all women is lost in the obscurity referred to. (*Rec.*, 752, 791-792.)

The man who was killed at Crooked Creek was shot on the night of the 17th of March. The next day came the in-

quest, and afterwards the burial in Medicine Lodge graveyard, and on the 19th John Brown undertook to communicate the intelligence to Mrs. Hillmon that he had himself shot and killed her husband. He did so by the following letter:

> "Medicine Lodge, Kansas, March the 19th, 1879.
> Mrs. S. E. Hillmon:
> I am sorrow to state the news that I have to state to you. John was shot and killed, accidentally, by a gun as I went to take it out of the wagon, about fifteen miles north of this place. I had him dressed in his best clothes and buried in Medicine Lodge graveyard. I shall wait here until Mr. Paddock hears from you. Write to me to take charge of the team; I will dispose of them the best advantage, and take the proceeds to you; and when I get back to Lawrence I will relate the sad news to you. Probably you have heard of it before you get this letter. Yours truly, John H. Brown." (*Rec.*, 481, 756.)

The volume of sympathy and almost of remorse that would naturally fill the heart of this warm-hearted and generous man find hardly such abundant expression in this letter as one might anticipate. The effort to soften and break gently this intelligence is not too apparent, but the information is sudden and abrupt as of one in haste to announce a *fait accompli*, and to have further instructions as to what he should do with "the team;" but there is no inquiry as to what she would have done with the remains of her husband. If she will instruct he will dispose of the team to the best advantage and take the proceeds to her, and then he will tell her the history of what has happened. But this was a mere note of early information before the insurance companies should get advices of the matter!

Baldwin cannot remember whether he did not testify on the second trial that he got his first tidings by a letter to him at Tonganoxie from John H. Brown (*Rec.*, 713), but there

seems to have been altogether a curious state of alertness and preparation at this time. Mrs. Hillmon was at Baldwin's house (*Rec.*, 792), and on this 24th day of March he brought her from his house to Mrs. Judson's, and the next day started for Medicine Lodge. Mrs. Hillmon says she sent them there to bring the body back to Lawrence, but Levi Baldwin makes no such pretense. He went with the utmost dispatch, but he went, as he says, "to see the state of affairs." (Rec., 687, 870.) He took with him his brother Alva, and they arrived there at least a day and a half in advance of any other parties from Lawrence. If he had any instructions to bring home the body he ignored them altogether, and acted as if he had none. He arrived in the night, met John H. Brown, made arrangements to fence the grave, and sent immediately lumber and posts to the cemetery for that purpose. (*Rec.*, 687-8, 707-8, 870, 1445-6.) There was then no purpose to disturb that body or other than to leave it to perish where it lay. But up at Lawrence some of the persons who on the part of the companies had been connected with this insurance, heard also, but more tardily, the report that Hillmon was dead. It first reached Major Wiseman on the 27th of March. (*Rec.*, 863.) Meanwhile Baldwin had left for Medicine Lodge on the 25th; and on the evening of the 29th Wiseman, with Col. Samuel Walker of Lawrence, and a Mr. Tillinghast, left Lawrence and arrived at Medicine Lodge about 11 o'clock in the morning of the last day of March. (*Rec.*, 792, 863, 864, 865.) On their arrival they found Levi Baldwin and his brother and John H. Brown, and their posts and lumber already lying at that cemetery a mile or so out of Medicine Lodge for the purpose of fencing that grave and leaving it undisturbed. (*Rec.*, 865-6.) Had that been done there could thereafter have been no earthly proof of the identity

of its occupant except the testimony of John H. Brown, and such as might spring from that diary, rounded up and finished at Lawrence, and the old army discharge, which were said to have been upon the person of the man who was shot by the camp fire at Crooked Creek, and the coat and vest of Levi Baldwin which had been stretched upon the cadaver. But on the arrival of these new parties a new phase came upon the situation. Upon their arrival the body was disinterred, and those who were acting there for the insurance companies discovered instantly then in their conviction that it was not the body of Hillmon at all. (*Rec.*, 867-70, 1065.) There is in this record the testimony of persons then standing by, given on this last and former trials, that when the face of the body was disclosed Alva Baldwin suddenly exclaimed, "Hell! that's not Hillmon," nor has that testimony ever been contradicted by Alva Baldwin until this last trial. (*Rec.*, 724, 867-8, 1583-4.) On their demand and insistence, therefore, it was borne directly to Lawrence, where Hillmon lived. Levi Baldwin and his brother took charge of it, and it was carried in a wagon to Hutchinson, and thence by railway. (*Rec.*, 347.) On the road to Hutchinson the hat and the shoes that had been upon the man who was shot disappeared and were lost. (*Rec.*, 426, 873, 1065.) Levi Baldwin telegraphed to the undertakers, Bailey & Smith, to receive the body, to buy a grave, and prepare for immediate interment, but this was thwarted on behalf of the insurance companies, who procured that the remains should be held for investigation and immediate inquest. (*Rec.*, 1505, 1527-30.) Much of the proceedings of this inquest and of the evidence presented there concerning the identity of that body is shown in this record. Both Levi Baldwin and John H. Brown testified there that it was the body of Hillmon. In the testimony of Brown occurred

a statement that a third person accompanied him and Hillmon on a part of their journey. (*Rec.*, 393, 399, 405, 443.) The respondent, the insensibility of whose demeanor at the inquest attracted attention, with some confusion and uncertainty also identified the body as that of her husband. (*Rec.*, 1029-30, 1465-9, 1472-5, 1595-7.) The body was that of a man five feet eleven inches in height or more, of a large bony and angular frame, having large feet and long bony hands with large joints. (*Rec.*, 926, 1012, 1197, 1310, 1530.) Upon his face was a light thin beard of from two to four weeks' growth. (*Rec.*, 326, 598, 611-12, 625, 635-6.) Upon him were *not* the clothes in which he had been shot. (*Rec.*, 324-5, 600, 601, 611, 621.) As previously stated, his hat and shoes were lost on the way to Lawrence. (*Rec.*, 426, 873, 1065.) The body had been re-dressed for burial at Medicine Lodge in clothes which had belonged to Hillmon, and the coat and vest were those which Hillmon had received in exchange from Levi Baldwin. (*Rec.*, 510, 703-5, 709.) The clothes were too small for the body, and they were such as Hillmon would never have exchanged for if they fitted him no better than they fitted the subject of the inquest. (*Rec.*, 924, 1321, 1197, 1529.) Some other tests of identity would seem to have been available to Mrs. Hillmon if she had cared to use them. Presumably she had garments which had belonged to him, for he would hardly have carried with him on this *winter* journey all he had in the world, and she might have tried whether they would fit this body. But it has been admitted that when he last went from Lawrence he had taken off and left with her a ring (*Rec.*, 779, 791), and it easily could have been told by the coroner and his jury if that ring would go upon the large jointed finger of him who lay before them.

Alva Baldwin, who was at the disinterment at Medicine Lodge and accompanied the body to Lawrence, and who was in Lawrence and could have testified that this was the body of Hillmon if he so believed, was not called for that purpose. (*Rec.*, 736, 1476.) The members of Hillmon's own family lived near by in Washington County, Kansas, but no notice was given to them by Mrs. Hillmon of the death of her husband, or of this inquest, nor was any opportunity given them to see the remains and identify the body of their brother (*Rec.*, 796); and yet the subject of investigation and the matter of dispute at that inquest was whether the body presented was that of John W. Hillmon.

The result of this inquest and its verdict are not shown in this record, but it does appear that in the night before they were announced John H. Brown departed from the State of Kansas, and took up his residence in Missouri under circumstances which made his departure seem a flight. He is said to have been under arrest at the time (*Rec.*, 1070); he had an extended conference with Levi Baldwin before going (*Rec.*, 432); he obtained money from Mrs. Hillmon (*Rec.*, 811, 816); and he pursued some curious wanderings in Missouri. (*Rec.*, 433-8, 489, 492.)

The account which Brown first gave of the man that was shot by the camp-fire on that night of March 17, 1879, is substantially that given in his deposition used on the trial below. (*Rec.*, 406-415; 418-424.) By that account they went into camp on Crooked creek, and in the evening of the 17th of March, Brown, riding up on horseback, notified a man living in the neighborhood of the camp that he had accidentally shot and killed his companion. The man so notified went to the camp and found a dead body having a bullet wound directly through the head, lying by the camp-fire, and said by Brown to be the body of Hillmon.

His statement was that after supper he went to the wagon for the purpose of removing some blankets, or other like material, therefrom; that a gun had been put in the wagon by Hillmon so that its muzzle projected over the side of the wagon, and that in the effort to remove the blankets they became entangled with the gun and discharged it, and thereby his companion, Hillmon, was shot through the head and instantly killed. The body was left undisturbed until the morning, when an inquest was held, and it was then removed to Medicine Lodge, where a second inquest was held, and it was then buried in the burial ground at Medicine Lodge, whence it was afterwards carried to Lawrence, Kansas.

If this was the body of Hillmon, then no witness save Brown was present in that camp when the shot that killed him was fired; and in any case the only direct testimony as to the circumstances under which the person whose body was there found came to his death, or as to his identity until after the disinterment at Medicine Lodge, comes from the lips of Brown.

Immediately after the inquest at Lawrence and the flight of Brown, his father, Robert Brown, applied to one W. J. Buchan, then a lawyer at Wyandotte, for his assistance. Robert Brown *told Mrs. Hillmon* about that time that he had employed Mr. Buchan "to take care of his son." (*Rec.*, 767, 1228, 1247, 1250.) Buchan immediately engaging in the protection of John H. Brown, and learning his whereabouts from his brother Reuben (*Rec.*, 1227, 547), had two interviews with him, the first one being in the latter part of April, 1879, or possibly the first of May, at Lexington, Missouri.

He went there accompanied by Reuben Brown, and what

occurred between them is stated in his testimony, a part of which is as follows (*Rec.*, 1228-9):

"Q. Now, you may state what took place between you and John H. Brown at that time, stating the conversation as it occurred?

A. John met us at the train at Lexington, about twelve o'clock, possibly a little after, and we went directly up to the hotel to dinner. I don't recollect any conversation that we had on the way up except as to why he hadn't met us at Orrick some time previous to that.

Q. Now, in that connection, you may state what he said in regard to why he hadn't met you at Orrick?

A. He said—I asked him why he hadn't met his father and me at Orrick quite a while before this, and he said he was a little afraid. He was a little afraid that somebody would arrest him and he didn't show up there. We then went directly to the hotel and sat down to dinner, had our dinner, and John and Reub and myself then walked out from the hotel quite a little ways and sat down upon a rock overlooking the bluff. I says, the substance of it was: 'Well, John, what is there about this business; what is it about this affair at Lawrence?' He replied, 'Well, Bill, it is bad business, it is a bad affair, and I sent for you; I want to turn state's evidence; they are hunting me; that wasn't Hillmon that was killed down there; it was another man; Hillmon has got away and they are hunting me, and I am left here in trouble and I want to get out of it; I want to turn state's evidence; I want you to see the attorneys for the insurance companies, Mr. Barker of Lawrence, and see if they will let up on hunting me if I will go on the witness stand and tell the truth about this whole affair.' That is the substance of it. He then went on—I asked him something about it. I said to him they couldn't prosecute him at Lawrence for a crime alleged to have been committed in Barber County; that he would have to be taken to Barber County and tried before a jury of that county, and then I asked him something about the coroner's jury down there; he said they were his

friends. I said, you are innocent and they would not convict you down there; it is not necessary to do that, but he said he had worried over this thing and he wanted it cleared up. He wanted it off his mind, wanted to get out of it, and wanted I should go up to Lawrence and hunt somebody connected with the insurance companies and tell them that if they would cease their attempts to prosecute him and follow him, in case any suits were brought to recover on those policies, that he would go upon the witness stand and tell the truth, and the truth was that it was not the body of Hillmon that was brought to Lawrence.

Q. Now, up to that time had you ever urged, or said anything to him about turning state's evidence?

A. Nothing.

A. I don't remember as to what was said; I explained to him. Had I said anything to him about it?

Q. Yes?

A. No, sir; I hadn't said anything more than I had merely asked what the affair was, the trouble he was in; he was very anxious to talk about it and to get it off his mind.

Q. Did he tell you—go into the details of the transaction, how it had taken place; did he state what he claimed to be the facts with reference to the transaction?

A. He recited to me the whole story, the whole transaction, of the trip from Wichita and back—two trips, I think they went from Wichita out there and back.

Q. Did he tell you whose body it was that was brought to Lawrence?

A. I asked him particularly about that, tried to find out whose it was, and he either didn't know, or didn't want to tell me; I don't know. He said it was, I think he said that it was a man by the name of Berkley, Joe Berkley, I think they called him."

The detailed history which he then gave (*Rec.*, 1230) of the two expeditions from Wichita was afterwards reduced to writing in the form of an affidavit (*Rec.*, 1237, 1284), and is set out in full hereafter. The purpose of

Buchan's employment was to procure for Brown escape from the criminal prosecution which he apprehended would be instituted by the insurance companies. (*Rec.*, 767, 1238-9.) In view of these facts the idea seems to have occurred that they might be made the basis not only of negotiations to induce the insurance companies to desist from criminal prosecution by making this evidence available to them in case of suits upon the policies, but also of procuring from Mrs. Hillmon the abandonment of such suits and the surrender of the policies. This thought cannot be deemed unnatural, and that under the circumstances it should suggest itself seems to have been almost inevitable, for she had seen the body produced at the inquest and knew perfectly well whether it was or was not the body of her husband (*Rec.*, 758, 821); and clearly the abandonment and surrender of the policies would be a matter of much value to the insurance companies. Now, it is not controverted nor sought to be obscured in the least, nor has it ever been in the history of this litigation, that at a much later time one H. B. Munn, acting for the insurance companies, with the consent of Brown agreed with Buchan to pay him for the service if he should procure the surrender and release of these policies. Brown was in a straight where he needed the active services of an attorney, but he had no money whatever with which to pay him. If Brown could be served and the attorney's compensation procured from the insurance companies, that was more to the advantage of Brown than of Buchan. Upon this subject everything was open and above board between Mr. Buchan and Brown, and was agreed upon and ordered by Brown in his own interest (*Rec.*, 591, 1247-8), and with the full knowledge of Munn, the agent of the insurance companies. (*Rec.*, 591, 1238-9.) After this interview at Lexington Buchan again

met John H. Brown at the farm and dwelling of his brother Reuben, at Parkville, Missouri. This was on or about the 4th of September, and then a written statement was prepared and was sworn to by Brown which contained in substance the history detailed by Brown at his first interview with Buchan at Lexington. (*Rec.*, 1233-8.) This history, narrated in April or May at Lexington, and afterwards in the affidavit made at Parkville in September, 1879, is as follows (*Rec.*, 1284-6):

STATE OF MISSOURI,
COUNTY OF PLATT. } ss.

John H. Brown, of lawful age, being first duly sworn according to law, deposes and says: My name is John Brown. My age, thirty years. I am acquainted with John W. Hillmon, also Mrs. Sallie E. Hillmon, and Levi Baldwin of Douglas County, Kansas; have known John W. Hillmon for about five years, have been with him a good deal for the past two years, was out with him last March at Wichita, and on the trip from there to and around Medicine Lodge in Barbour County, Kansas, where it is claimed that I killed him on the 17th of March, 1879. Along about the 10th of December, 1878, John W. Hillmon, Levi Baldwin and myself talked about and entered into a conspiracy to defraud the New York Life Insurance Company and the Mutual Life of New York out of some money to be obtained by means of effecting a policy or policies on the life of said John. W. Hillmon. Baldwin was to furnish the money to pay the premium and to keep up the policies in case they had to be renewed. Our original arrangement was to get Hillmon's life insured for fifteen thousand, but it was afterwards changed to twenty-five thousand dollars. Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact to in some way find a subject to pass off as the body of

John W. Hillmon, for the purpose of obtaining the insurance money aforesaid; we had no definite plan of getting the subject, but to in some manner get one, the final termination of the matter was the last idea thought of our first trip out from Wichita the last days of December, while the snow was on the ground we expected to find a subject that would appear to be Hillmon frozen to death, and *that* could not be identified only by the clothes and papers found on it, and so I could pass off as Hillmon. We went from Wichita to Medicine Lodge, then direct to Sun City, from there to Kinsley, from there to Great Bend on the Santa Fe road, then to Larned, and on to Wichita via Hutchinson. Hillmon and myself were entirely alone on this trip. Isliff of Medicine Lodge saw Hillmon on this trip; we put up at his stable. I then stayed at Wichita until the 4th of March, Hillmon in the meantime went up to Lawrence to see his wife and get some more money; he returned about the first of March, and on the 5th we left on our second trip. We went due west to Cow Skin Creek, then west to Harper City, then to Medicine Lodge on by Sun City and beyond some miles; then we turned northeast down Medicine river to a camp on Elm creek about eighteen miles north of Medicine Lodge, where Hillmon is claimed to have been killed. We got there about an hour before sun down, and stayed in camp until the next evening. We overtook a stranger on this trip out from Wichita about two or two and one-half miles from town, who Hillmon invited to get in and ride, and who he (Hillmon) proposed to hire to herd and work for him on the ranch as proposed to be located. This man was with us during all this trip. Hillmon proposed to me that this man would do for a subject to pass for him. I told him and contended with him that the man would not do to pass off for him, giving him various reasons why the man would not answer his description, and complained and objected because his proposition was to take the man's life, and I protested and said that it was going beyond what we had agreed, and something I had never before thought of and was beyond my grit

entirely. But Hillmon seemed to get more deeply determined and more and more desperate in the matter. Pains were taken not to have more than two of us seen together in the wagon. Sometimes one and then the other would be kept back out of sight. On this trip, up to Lawrence, Hillmon was vaccinated, his arm was quite bad. Hillmon kept at the man until he let him vaccinate him, which he did, taking his pocket-knife and using virus from his own arm for the purpose. He also traded clothes with him. Hillmon, first giving him a change of underclothing, then traded suits; the one he was killed in was a suit Hillmon traded with Baldwin for. This man appeared to be a stranger in the country, a sort of an easy-going fellow, not suspicious or very attentive to anything. His arm became very sore, and he got quite stupid and dull; he said his name was either Berkley or Burgess, or something sounding like that. We always called him Joe. He said he had been around Fort Scott awhile and also had worked about Wellington or Arkansas City. I don't know where he was from nor where his home or friends were. I did not see him at Wichita that I know of. I had but very little to say to the man, and less to do with him. He was taken in charge by Hillmon and yielded willingly to his will. I dreaded what I thought was to be done and kept out of having any more to do with him than possible. I frequently remonstrated with Hillmon and tried to deter him from carrying out his intentions of killing the man. The next evening after we got to the camp last named the man Joe was sitting by the fire. I was at the hind end of the wagon either putting feed in the box for the horses or taking a sack of corn out when I heard a gun go off. I looked around and saw the man was shot and Hillmon was pulling him around to keep him out of the fire. Hillmon changed a day book from his own coat to Joe's and said to me everything was all right and in shape as he wanted it and that I need not be afraid, but it would be all right. He told me to get a pony and go down to a ranch about three-quarters of a mile and get some one to come up. He took Joe's valise and started north. This was about

sun down. We had no arrangements about communicating with each other; he first proposed to do so, but I told him I did not want to know where he was, that in case I should I might find out some other way. I have never heard a word from him since. At Lawrence Mrs. Hillmon gave me to understand that she knew where Hillmon was, and that he was all right. The man over whom an inquest was held at camp, afterwards at Medicine Lodge, and at Lawrence, Kansas, was the man Joe Burgess or Berkley, killed by Hillmon as related above, and John W. Hillmon I believe to be still alive, at least he left our camp and went north, as stated above, after killing Joe. Hillmon said he would assume the name of William Marshall. Baldwin's wife and Mrs. Hillmon know all about this. In my testimony at Lawrence I stated the route taken as above described, but the man who I described as being in camp with us and who I said went off with some wagons was Joe, the man killed. I afterwards, some time in August, 1879, made four affidavits, under great importunities from Baldwin, who came after me three different times, the last time persuading me to go with him to Kansas City, where Hon. Saml. Riggs insisted on me signing them. I don't think Mr. Riggs is aware of the facts in this case, nor the other counsel in the case.

I make the above statements in the Hillmon case as the full and true facts in the case, regretting the part I have taken in the affair.

(Signed) JOHN H. BROWN.

Subscribed in my presence and sworn to before me this 4th day of September, A. D. 1879. My term expires on the 3rd day of April, 1883.

FRANCIS M. MCDONALD,
[SEAL] *Notary Public.*

This is to certify that we have this day compared the above with the original and that the same is a true and correct copy of said original.

W. J. BUCHAN,
J. W. GREEN.

LAWRENCE, Sept. 13, 1879.

At the same time that this statement was made and sworn to at Parkville, John H. Brown signed and delivered to Mr. Buchan the following authorization (*Rec.*, 591, 1237):

> "PARKVILLE, Missouri, September 4th, 1879.
>
> I hereby authorize W. J. Buchan to make arrangements, if he can, with the insurance companies, for settlement of the Hillmon cases by them stopping all pursuit and prosecution of myself and John W. Hillmon if suit for money is stopped and policies surrendered to companies.
>
> JOHN H. BROWN."

Thereupon Buchan went at once to Lawrence (*Rec.*, 1238-9, 1249), and there was given the following paper by Mr. Munn:

> "*W. J. Buchan, Esq.:*
>
> DEAR SIR: On behalf of the Mutual Life, New York, Connecticut Mutual Life I hereby authorize and employ you to procure the surrender of the policies of insurance on the life of John W. Hillmon.
>
> H. B. MUNN.
>
> KANSAS CITY, Sept. 5th, 1879."

It is certain, therefore, that any employment of Buchan for any purpose connected with these policies of insurance by the insurance companies was not earlier than the 5th and 6th of September (*Rec.*, 580, 590-592), and was long subsequent to the interview he had with John H. Brown at Lexington in April or May, and subsequent to the occasion at Parkville, when the substance of the statement made at Lexington was reduced to writing and sworn to by Brown.

II.

We are brought thus to the opening of another chapter in this history.

About noon of Friday, the 12th of September, 1879, Levi Baldwin appeared at Mrs. Judson's, where Mrs. Hillmon stayed, in Lawrence, and took her out to his house. A remarkable forgetfulness has thrown deep obscurity over the details of that journey. Baldwin had come in on horseback. The bridge over the river was down, so that he and Mrs. Hillmon were forced to cross in a boat to North Lawrence. She then rode in the wagon of some neighbor to a house about three miles nearer than Baldwin's, where Baldwin, who rode beside the wagon on horseback, left her until he should come for her, and rode on home. She had lived all her life from girlhood in that region, continually traversing that road, but she cannot remember the name of the neighbor in whose wagon she rode, nor the location of his house, nor any description of it, nor the names of its inmates. She remained there until some time in the evening, when Levi Baldwin came for her, and she arrived at his house about half-past nine. When she arrived there she found John H. Brown. She cannot recollect whether she learned from Mrs. Baldwin on her arrival that he was there, or whether Baldwin told her on the way. There Brown told her of the statement that he had made, and she made an appointment to meet him and Buchan at Leavenworth on the next Monday. She remained at Baldwin's until Monday morning, when his son took her over to the train for Leavenworth at Tonganoxie station, and at Leavenworth she met Brown and Buchan at the Planter's Hotel. (*Rec.*, 715-16, 768-9, 813-824, 1897-1900.) Finally, as the result of the conference between them, she executed re-

leases of these policies and they were witnessed by John H. Brown, and then she went herself with Mr. Buchan to the office of her principal counsel, whose residence and office were in Leavenworth, and called for the delivery of the policies. Mr. Wheat, however, refused to deliver them and claimed that the attorneys had a lien upon them for about $10,000. She returned, therefore, to the hotel without obtaining possession of her policies. (*Rec.*, 773-4, 822, 1241-3.) Certainly it seems remarkable, if she knew that the dead man at the inquest at Lawrence was her husband—*and she knew* whether he was or not—that when she was actually in the office of her principal counsel, Mr. Wheat, at Leavenworth, she should not have taken the occasion to consult with him, to inform him of the new situation that had arisen and take his counsel upon how she ought to act. Moreover, she had spent all of Saturday and Sunday at the home of her cousin, Levi Baldwin, where she had been taken for the express purpose of meeting there John H. Brown. (*Rec.*, 1239.) During those days and the quiet of that Sunday she must have pondered and discussed with him this new situation. On Monday morning she went to Leavenworth *on purpose to do there exactly what was done;* and when Buchan proposed that she should accept the statement of Brown and release these policies and abandon the claim that her husband was dead she does not seem to have cared to consult Levi Baldwin further, any more than her counsel, Mr. Wheat. No force or constraint, moral or otherwise, bore upon her, beyond her own personal knowledge of the affair. She signed the releases prepared for her and delivered them. Nor is that all, for after signing the releases she visited her sister at Ottawa for a couple of weeks, and while there received from Buchan a letter in which she stated that a mistake had been made in one of the releases

and asked her to come again to Wyandotte to sign papers. She, thereupon, went there about September 25th and signed the New York Life release. (*Rec.*, 513-19, 777, 825-6, 830, 1244-6.)

Petitioner claimed that the release thus executed at Leavenworth was valid and effective, and by pleadings set it up in defense. (*Rec.*, 14, 19.) Respondent, seeking to avoid the effect of this release, and deeming that the burden was upon her to overcome it, put it in evidence and then proceeded to impeach its legal effect upon various grounds. The right of respondent thus to impeach evidence which she had introduced, and its allowance by the court, is the basis of certain assignments of error in the admission of testimony on that subject. The court instructed the jury that the release was void particularly for want of consideration, and constituted no defense to the action. It was contended by respondent that the release was illegally obtained by petitioner by a contract to compound a felony in agreeing to refrain from the criminal prosecution of Brown and Hillmon; that it was fraudulently obtained by misrepresentation and deceit in leading respondent to believe that John H. Brown, her principal witness, would testify that the body brought from Medicine Lodge to Lawrence was falsely pretended to be that of Hillmon; and that the release was void for want of consideration. (*Rec.*, 575-586, 772-3, 821-2, 1272-6.) Reply to these contentions is not difficult. If there was agreement to compound felony, then the felony existed, and there was *no right of action* on the policies, and an admission of the felony could not be used to support the action by defeating the release. If the body presented for Hillmon's was a false one, respondent, who had seen that body, knew that fact, and she had no

legal right which was invaded to testimony in support of the fraud. The testimony related to a question of identity of a body which could be recognized and identified as being or not being Hillmon's by all who knew him, but this question of identity of the body and so whether the statement of the witness would be true or false, was one of the *fundamental and chief issues to be tried in the cause,* and could not be raised, tried and decided collaterally by the court on this question concerning the release. The release was an integral and formal contract which imported consideration, and, when specially pleaded, could not be attacked *at law* for want of consideration.

Nor does it follow that the release was void for want of consideration merely because no money was paid for it. When the plaintiff executed this release she knew with absolute certainty whether the body presented at Lawrence as that of her husband was the true or a false one. It it was true that the body was a false one and was not Hillmon's, a bill in equity might compel a release and cancellation of the policy of insurance and the avoidance of such litigation, and its expense would be a sufficient consideration. So, too, in such case the underlying moral duty to abandon and release the policy would be a good and legal consideration for the release. It is not enough in order to avoid the release merely to prove that no money was paid respondent as consideration. A money consideration assumes that the policy had some lawful value which she relinquished and gave up by compromise or exchange; but, if the facts charged in defense were true (and she knew it absolutely if they were) the policy had no lawful value, nor had she a moral or legal right to exact or be paid anything for it.

In any event, under all the conditions of deliberation on

the part of the plaintiff and of her personal knowledge of facts, the release was important evidence in the nature of an admission of her belief that the body brought from Medicine Lodge and which she had seen at the inquest at Lawrence was not the body of her husband.

The account given by Brown at the inquest in Lawrence and in his deposition read on the trial below of the man who was found dead in his camp by Crooked creek on the 17th of March, 1879, is very different from the sworn statement made at Parkville when the cold shadow of Nemesis had fallen upon him, and he was shrinking from the apprehended vengeance of the criminal law. This sworn statement, introduced on this trial by the plaintiff, was available to the court in evidence for various purposes. First and primarily, it was available to impeach and utterly destroy the credibility of Brown as a witness. John H. Brown was the only witness in the case who ever knew the exact conditions under which that man who lay dead that night by the fire on Crooked creek came to his death. No other witness knew of his own knowledge who fired that accurate and fatal shot which caused the instant death of its victim. If his testimony be eliminated from the case, there is absolutely no direct evidence in it of the circumstances under which this event befell. He has not hesitated to make at different times the most contradictory statements, of the gravest character and involving most solemn consequences, and to swear to them all without qualification or reserve. He made one statement as a witness at the inquest in Lawrence. Then waiting about in an adjoining room he watched the course of events (*Rec.*, 1232) and upon the close of the proceedings fled from the state into Missouri. There, at Lexington, he made a statement from beginning to end of the whole transaction wholly contra-

dictory of his testimony at the inquest at Lawrence. A few months later, in Missouri, at the instance of Levi Baldwin, who went to find him there for that purpose, and as he says, "under great importunities from Baldwin, who came after me three different times," he made the affidavits used for proofs of death in the actions against the insurance companies. (*Rec.*, 432, 714, 717-19, 1234-5, 1286.) Subsequently, on the 4th of September, at Parkville, he signed and swore to the statement which he had made at Lexington in April or May. (*Rec.*, 1237-8.) A little later he went to meet Mrs. Hillmon at Levi Baldwin's house, where he stayed with her a day or two and reiterated this statement that he had sworn to; afterwards he met her at Leavenworth, where he again told her of this statement he had sworn to, and that the body at Lawrence was not that of her husband and that he should stick to it; and about a year later, in December, 1881, he made the deposition upon which respondent has relied in this case. Whatever may be said of others, there need be no limitations upon the language which should characterize John H. Brown as a mendacious, conscienceless and irredeemable scoundrel. Not one word that has ever emanated from him in any account relating to this transaction is entitled to trust or credence because he uttered or swore to it. We may properly refer and need add nothing to what was said by Judge Shiras in his charge to the jury upon the third trial of this case. That charge, for some purposes, was referred to and examined by the Circuit Court on the last trial (*Rec.*, 1609), and it is a part of the record which was before this court on the former review, reported in 145 U. S., 285.*

* "For the purpose of impeaching a witness and affecting his credibility it is permitted to a party to show that the witness has at other times and places made contradictory

In another aspect this sworn statement was available as evidence. It was deliberately offered and introduced by counsel for respondent, and was admitted in evidence without objection. (*Rec.*, 1284.) John Brown was already

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statements of such a character that they are inconsistent with his evidence on material points, and it then becomes a question for the jury to determine whether any, and, if any, what, weight shall be given to the testimony of the witness whose credibility is thus impeached Juries must in such cases distinguish between mere inconsistencies in statements of past transactions, made at different times, which arise from the lapse of time and the imperfection of human memory, and those positive and material contradictions which cannot be attributed to these causes, but must have been made intentionally. The contradictory statements relied upon as impeaching the credibility of the witness Brown belong to the latter class. By no possible exercise of charity can it be supposed that the witness became honestly confused in his recollection as to the events that took place in the camp on Crooked creek. He knows whether it was Hillmon that there met his death by being shot through the head through the accidental discharge of a gun in the manner described by the witness, or whether it was another person who was intentionally shot by Hillmon himself.

"Brown himself admits making the written statement which is relied upon to impeach him, but claims that he was induced to make it by the representations made to him by one W. J. Buchan that unless he did so he, the witness, was liable to be arrested on a charge of being accessory to a murder. You have heard, gentlemen, the testimony adduced by both parties touching the circumstances under which this written statement was made, and it is for you to say what the truth is in this particular. Whether it be true that Brown voluntarily sent for Buchan, as is claimed by the latter, for the purpose of consulting with him in regard to the best method of avoiding all further trouble and preventing his arrest on a charge of murder by turning state's evidence or by making a statement which would aid in defeating a recovery on the policies of insurance on the life of Hillmon, or whether Buchan and members of Brown's

her witness. It was strenuously claimed by petitioner that being thus introduced, it was evidence for all purposes against respondent to precisely the same extent as any part of John Brown's deposition read on the trial. Instruction

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family urged Brown, as he claims, to make the statement in question in order to avoid arrest and to put a stop to any prosecution or effort to prosecute him at the instance of the insurance companies, the fact remains undisputed that he made the statement which has been read in your hearing, and which is, in its material matters, in direct contradiction to his testimony as a witness in these cases. According to his own testimony, he was willing, in order to save himself from a possible arrest and prosecution for an alleged offense, which he now testifies was not committed, to swear to a statement which, if true, would show that he was a deliberate and active participant in the murder of a third person and in the effort to palm off the body of such third person as that of John W. Hillmon for the purpose of cheating and defrauding the insurance companies, whilst, on the other hand, if the statement was untrue, the making it would probably result in cheating and defrauding Mrs. Hillmon by preventing her recovery on the policies on the life of her husband. In other words, if the matters contained in the written statement signed and sworn to by Brown are substantially true, then he confesses that he willingly and deliberately entered into a conspiracy with John W. Hillmon and Levi Baldwin to cheat and defraud the insurance companies, and in carrying on the conspiracy he became an accessory before and after the fact to a cold-blooded murder of an unoffending third person who had been induced to join *he* and Hillmon on their trip. If these statements are not true, then it appears that Brown has deliberately sworn falsely to the matters set up in the written statement, knowing that the statement would be used to defeat plaintiff's recovery on the policies of insurance, but being willing so to do in order to escape arrest and prosecution for his connection or alleged connection with the death of the person who was killed in Barbour County.

"Can any dependence be safely put on the testimony of a witness who has placed himself in the position of this man Brown?"

was asked to this effect, and its refusal is assigned for error. In any event the affidavit is evidence to prove the *fact* that he *made* it. It may be considered upon principles analogous to those upon which in this case the letters of Adolph Walters were held relevant by this court. (145 U. S., 285.) The fact that under the circumstances of the moment he *made* such a statement is as competent evidence as the fact of his flight, and is of the same character. Whether the things stated were true or not—whether some were sincere or others intended and designed to deceive—is another matter. The affidavit is available to prove the fact that he made it, even if not evidence that the things alleged in it are true; and those allegations thus made become circumstances which may derive credence from other circumstances with which they fall into connection, or may reciprocally confirm and explain and give significance to other circumstances existing and appearing independently, and in this connection the statement may be entitled to great consideration.

The application for this policy of insurance (*Rec.*, 180, 183) was subscribed to by the insured who procured it, and by respondent, through his agency. Under its terms if it was obtained from the insurance company by Hillmon, not for the ordinary and lawful purpose indicated upon the face of the transaction and stated in the application and the policy, but for other and different purposes not disclosed, and if Hillmon, by combination and conspiracy between himself and others, procured the policy with concealed designs and purposes which were fraudulent and illegal, and the insurance company was induced to issue the policy by misrepresentation and concealment of the true design and intent for which it was obtained, then the policy and the contract of insurance were void *ab initio* and could not be made a ground of cause of action by respondent under any

conditions whatever. Such instruction to the jury was asked of the court and was refused.

Such other parts of this history as are material on the present hearing will come into notice in connection with the specific assignments of error to which they are related. The record discloses the contention of petitioner, and the remarkable and conclusive evidence by which it is supported, that the man who was shot in that remote camp on the evening of March 17, 1879, whose body was buried at Medicine Lodge and afterwards taken to Lawrence, was not John W. Hillmon. The statement dropped by John H. Brown before the inquest at Lawrence that on his last expedition with Hillmon from Wichita a third person was with them some part of the time, was followed by the development of a body of evidence and of a multitude of independent circumstances which confirm and establish the conviction that the statement detailed by Brown at Lexington, and afterwards in a written form sworn to at Parkville, is substantially the true history of this entire transaction. The burden was, of course, upon respondent to prove the death of Hillmon within the conditions of the policy, and at the time and place stated in her petition. The entire burden of proof was upon her and not upon petitioner. The evidence developed, however, has been so abundant and convincing that petitioner believed it in its power to prove that Hillmon was not killed at Crooked creek, and not only that the man who was slain there was not Hillmon, but even to go farther, and to prove who he was, and that he was a young man named Frederick Adolph Walters, who had formerly lived at Fort Madison, Iowa, and had gone to Wichita, and whom Brown and Hillmon had enticed to go out with them upon that fictitious looking for a stock ranch, and had lured into that desolate camp on Crooked creek. The record reveals these men at

Wichita quietly but sedulously searching for some one to go with them into the wilderness. Hillmon sought to induce a man named Marshall to go out with him and teach him the art of catching wild horses. (*Rec.*, 1403.) He noted Hillmon's appearance with particularity—his neatness of dress, his "neat, small foot, wearing about a five and a half or six boot" (*Rec.*, 1402), his defective teeth (*Rec.*, 1401), the scar on his hand, and when on cross-examination he was asked if he had special reasons for his memory of the descriptive features of Hillmon, one is hardly surprised by the following (*Rec.*, 1406):

> "A. I should rather think I did.
>
> Q. State them? A. Well, after the occurrence came up of this man being murdered, and knowing that Hillmon was trying to get me into the same trap, it is natural for one to suppose that they would remember something about him more particular than others."

They applied to Michael Mesh and sought to induce him to go with them (*Rec.*, 1561), and they also tried to employ Ben Helda (1575). Finally they threw their net over Frederick Adolph Walters, a young cigarmaker who had wandered from Fort Madison, Iowa, and was in Wichita seeking for employment and obviously curious to travel. Letters which he wrote on the very eve of the departure of Hillmon and Brown upon their expedition show that they had succeded with him as they had not with Marshall or with Helda or with Mesh, for he had engaged to go to with them for service upon this mythical cattle ranch, which they had yet to procure and to stock without money. (*Rec.*, 1687-1690; 1713-14, 1742, 1775-6.) But they could undertake freely to pay ample wages to the one who should go with them; and they could do so with impunity, for it was obviously no part of the scheme that the day of payment should arrive immediately. This circumstance, namely,

their uniformly offering large wages to induce some one to go with them, which is related independently by each witness, is confirmed, and the truth of their testimony is confirmed by the statement of Walters occurring independently in his letter to Miss Kasten (*Rec.*, 1689-90), that Hillmon "*promised me more wages than I could make at anything else.*" An acquaintance of Walters, Healy, who lived with him at Wichita, had information of his engagement with Hillmon, and of his expectation of going with him through Medicine Lodge. He gave Walters a message to a business associate at that point, which Walters accepted to deliver, but to which no reply ever came. (*Rec.*, 1417-18, 1430.) The incidents of obscurity and concealment which in every narration attend that final journey from Wichita to Crooked creek are in accordance with and confirm the sworn statement of Brown to Buchan. The mysterious order of Hillmon to the postmaster at Wichita to deliver his mail to no one, even if one should come with an order from him (*Rec.*,1599); the curious concealment and seclusion of that camp which is described by the witnesses Frazier and Paddock (*Rec.*, 325, 1448-1451); remote from the highway and separated by a rough and broken interval; hidden in a ravine into which no one could see from any traversed portion of the surrounding country; a position where men might lie in camp for days unvisited and undiscovered; the accurate aim that brought instant death just at nightfall; the mysterious information to Baldwin and to Mrs. Hillmon, which no one can trace nor they remember; the leisurely burial at Medicine Lodge, and the defined intention to leave the body permanently there—all accord with the history and the purpose detailed by Brown. The activity and resolution of the insurance companies thwarted the purpose to leave that body to become undistinguishable in the grave at Medicine Lodge,

and caused it to be transported to Lawrence, where it was submitted for observation and for identification by anyone by whom it might be recognized. There the companies caused the remains to be photographed and preserved every possible means of identification. It is strange that in that community where Hillmon lived and was known, only Levi Baldwin and Brown and respondent and few, if any, other reputable and trustworthy witnesses ventured the opinion that that was the body of Hillmon. Respondent, as has been stated, gave no notice of its presence there to his sisters or other members of his family, but when afterwards she applied to them they with absolute unanimity declared that if the body answered the description given it was not that of Hillmon. (*Rec.*, 1118, 1136-7, 1158, 1172-3, 1184-5.) On the other hand, it was not in the slightest degree incumbent upon the defendant to prove that it was the body of Walters, but from descriptions given and from photographs all the members of his family identified it as his without hesitation or qualification, and his sisters and brothers have testified unequivocally to that effect on several trials of this case. Still it would be immaterial if it were not the body of Walters. It would have mattered nothing if Walters, living, had entered the court room and taken his place among those attending that trial. The vital question would still have remained, whether the body at Lawrence was the body of Hillmon? Still it would have remained true that it was the body of a man *like* Walters, and *not* in the least *like* Hillmon, and one that by no possibility under the evidence could have been the body of Hillmon.

FIRST SPECIFICATION.—RELATING TO THE CONSOLIDATION OF THE CAUSES.

The order made by the court below consolidating the cases for trial was made under authority of Sec. 921 of the Revised Statutes, which is as follows:

> "Sec. 921. When causes of a like nature or relative to the same question are pending before a court of the United States or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The effect of such consolidation of the two cases for trial, according to the ruling of the Circuit Court, was to give the plaintiff six peremptory challenges to the jury, while each defendant had but three. On all former trials the plaintiff had concurred in the consolidation of the cases for trial, while the defendant had opposed the order and moved for separate trials. The stipulation between the parties, therefore (*Rec.*, 69-70), that the cases should thereafter be tried separately, *was a waiver by the plaintiff* as to each defendant of any possible right to a disproportionate number of challenges, because if the cases were tried separately the plaintiff and the defendant would each be entitled to but three peremptory challenges to the same jury. Concerning this statute this court has declared as follows, *Insurance Company* v. *Hillmon*, 145 U. S., 285, 293:

> "Although the defendants might lawfully be compelled at the discretion of the court to try the cases together, the causes of action remained distinct and required separate verdicts and judgments; and no defendant could be deprived, *without its consent*, of *any right* material to its defense, whether by way of chal-

lenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

The ruling of the court that the plaintiff was entitled to six challenges was in effect a contrary construction of the statute. If, as between the plaintiff and each defendant, the parties could not, as to the same jury, be given their exact rights on the one hand and limited to their exact rights on the other, the only alternative was to sever the causes and try them separately.

Stroh v. *Hinchman,* 37 Mich., 490.
State v. *Stoughton et al.,* 51 Vt., 365.
Cruce v. *The State,* 59 Ga., 90.

As to any right which a defendant would have upon a separate trial, we may recall and apply the language of BREWER, J., in *State* v. *Durein,* 29 Kas., 691, where he said:

"If one consenting to a joint trial does not waive this right, *a fortiori* one who is compelled against his will to a joint trial ought not to be deprived of it."

In its aspect as a waiver of any rights of challenge which the plaintiff could have on a joint trial which it would not have on a separate trial the stipulation should have been respected and have been given effect.

SECOND SPECIFICATION.—RELATING TO THE PEREMPTORY CHALLENGES.

At common law peremptory challenges existed as a right in criminal but not in civil cases. When an act of Parliament declared simply that a party in a civil cause might have so many peremptory challenges, the right thus extended into civil cases found its definition and conditions

already established by law. Limitations which the statute refrained from imposing could not be imposed by the court. The court therefore in the absence of express statute had and has no more power to change the statutory number of challenges, or to *subject a defendant to new conditions in the making up of the jury,* than it has to deprive him of his jury altogether. The court below was led by construction of the Federal statute to the view of its legal effect declared, and to the conclusion to which exception was taken. On a former trial of these cases the court conceived them so effectively consolidated that the defendants in all three cases were entitled only to the number of challenges allowed by statute in one case. But this court *reversed the judgment* (*Insurance Company* v. *Hillmon,* 145 U. S., 293), and held that the cases were joined for trial in form only while they remained radically distinct, and the right of each defendant *remained unimpaired in its own case*. In this trial the Circuit Court passed to precisely the opposite extreme. It regarded each defendant as *one party,* and the plaintiff as *two parties.* It gave the plaintiff *more* challenges than she would have in one case; and held that the causes of action remained distinct, and that *to one jury* the plaintiff was entitled to its full number of challenges *in each cause,* with the result that each defendant, *without its consent* and against its protest, was compelled to try its own individual cause before a jury to which it was given only one-half as many peremptory challenges as the plaintiff. The right of *each* defendant did *not remain unimpaired in its own case* any more than in the former instance. There each *defendant* was allowed *fewer* challenges than was its right to a single jury. Here the *plaintiff* is allowed *more* challenges than was her right against *each* defendant to a single jury. It was necessary,

of course,—and the court ordered,—that there should be a separate verdict in each case; and therefore the composition of the jury was of precisely the same practical importance to the petitioner as if its case had been tried separately.

The defendant in one of the separate cases *had no common* interest with the defendant in the other such as corresponds to the single interest of several defendants in one cause, or that of the *single plaintiff* in all the causes. The two defendants here were entitled to an *aggregate* of six challenges. But if, as occurred in this case, one defendant omitted to use one of its challenges, the other could not take it up and use it. Each defendant did use but two, but if the Mutual Life had omitted to use any of its three, the Connecticut Mutual could not have used six. Its *right* was limited to three. On the other hand, the plaintiff was given six to the one jury, irrespective of the number used by either defendant. Under the decision of this court no party can be given more than the three statutory challenges to the one jury by which its cause is tried; nor does the statute give a plaintiff *more* challenges to the jury by which any defendant is to be tried than are given to that defendant. The court had no power, therefore, to alter the conditions as to any defendant affecting *the composition of the jury.* If it could not in this particular give each defendant a trial under the same conditions in that respect as if the cases were separately tried, the only alternative was to sever the causes and allow separate trials. It matters little in effect whether the composition of the jury is affected prejudicially to the defendant by abridging the defendant's challenges or by according a disproportionate number to the plaintiff. A situation, *never improbable,* may easily present itself to the imagination of the court. In a forum charged with an atmosphere of social or political prejudice, where a panel is

to be filled by talesmen taken from bystanders, every additional peremptory challenge makes arbitrarily a vacancy which may be filled, in spite of the defendant, by a juror inspired by such prejudice. The right of every and of each defendant that its adversary shall *not* have *against it* a disproportionate number of peremptory challenges is as absolute and as important as its right to its own full number; and one is correlative to the other. Always it has been held that the right of peremptory challenge on the part of defendants could not be abridged by uniting cases for trial (*U. S.* v. *Marchant,* 12 Wheat., 480), and equally the conclusion has been repudiated that the peremptory challenges of the state or of a plaintiff could be multiplied by the same process. The whole body of authority and of adjudication known to us is in denial of such conclusion, except *possibly* one case based on the language of a statutory provision.

Thompson in his work on Trials says in Sec. 45:

> "Although the defendants so jointly indicted may severally be permitted the statutory number of challenges, *this does not increase the number allowed to the state* beyond the number allowed to it in the case of a single defendant."

Proffatt in his work on Jury Trials says in Sec. 164:

> *"No matter how many are tried on the same indictment the prosecuting officer is only entitled to his challenges for one and cannot claim them for all."*

In *Savage and James* v. *The State,* 18 Fla., 909, the court said:

> "The ninth, seventeenth and eighteenth errors assigned are that the court allowed the state attorney more than five peremptory challenges.
>
> Four persons called as jurors were challenged peremptorily by the state after it had so challenged five, and the challenges were allowed by the court. The

statute allows challenges as follows: 'In capital cases the prisoner shall have twenty peremptory challenges and the state five.'

Where two are jointly indicted and tried for a capital offense each prisoner is allowed twenty peremptory challenges, but the law does not allow more than five to the state as to both. *To allow the state to challenge five for each would in effect give the state ten for each prisoner, because each challenge affects each prisoner alike.* Counsel for the plaintiffs in error cite several authorities to sustain this position.

We have found no other cases directly in point. It is clear that the court erred in allowing more than five peremptory challenges to the state, and an exception having been taken to the action of the court there was *material error affecting the rights of the defendants."*

In *Wiggins* v. *The State*, 1 Lea (Tenn.), 738, the court said:

"In making up the jury for the trial of the defendants (in court below) after the state, through the attorney general, had challenged four jurors, another juror being presented was challenged by the state and accepted by the accused; but the court being of opinion that when two defendants were on trial under a joint indictment the state was entitled to double challenges, overruled the motion of the defendants that the juror should take his seat for the trial of the cause, and afterwards, the defendants having exhausted their challenges, the jury were elected.

By the act of 1875, ch. 75, 'in the trial of criminal prosecutions' of this character the state is entitled to four peremptory challenges. Under the act of 1829, ch. 55, which provided that 'in the trial of all indictments,' etc., 'the state and the defendant shall each be entitled to challenge peremptorily five jurors,' it was held that where two defendants were arraigned each had the right to the full number of challenges. (*Hill* v. *State*, 2 Yer., 246.) The rule thus established has been followed ever since. But the court refused to extend the rule to civil cases. (*Blackburn* v. *Hays*, 4 Col., 227.) It is argued that the state should have the

benefit of the construction. But the reason of the rule is, that the right is given to the defendants, and where there are several defendants, although they may be tried together, *yet the judgments may be different. Each defendant is on trial, and must stand or fall, ordinarily, as if tried alone.* It is only a natural and reasonable construction of the statute to hold that every defendant should have the benefit of its provisions. The state, however, *is not multiplied with the defendants,* and, having elected to indict and try the parties together, cannot claim beyond the fair meaning of the language used. Nor has the construction contended for ever prevailed in practice. The court erred, therefore, in its ruling."

In *Mahan* v. *The State,* 10 Ohio, 234, the court said:

"It is provided by the fifteenth section of the act, entitled, 'An Act relating to juries,' 29 Ohio Laws, 98, that every prosecuting attorney, and every defendant on the trial of an indictment, may challenge, peremptorily, two of the panel; and if any person, prosecuting in behalf of the state, shall challenge any petit juror, except as aforesaid, he shall immediately assign the cause of such challenge. It would seem to us this language can hardly admit of construction. The words themselves express the legislative intention as clearly as it could be well conveyed.

There was but *one* indictment, and, on the part of the state, *the right of peremptory challenge should have been confined to two,* while each of the defendants could, in like manner, legally object to the same number. Had the defendants been separately tried, the indictment would have been separate as to each; *Bixbe* v. *The State of Ohio,* 6 Ohio Rep., 86; and on every trial, the state's right to such challenge of two of the jurors would have been legal; but upon a joint trial it is otherwise.

In extending this right of peremptory challenge to *six,* as claimed by the state, it is our opinion, *the privileges which the law throws around the accused, to a certain extent, as a shield for his protection, in the selection of his triers, was clearly invaded,* and that the Court of Common Pleas, therefore, erred."

In *State* v. *Earle*, 24 La. Ann., 38, the court said:

"It appears from an inspection of the first bill of exceptions taken during the trial, that the state was allowed to challenge peremptorily *more than six jurors*, the court below deciding that each prisoner was entitled to twelve peremptory challenges and *'the state to six for each accused.'*

It is true that each defendant was entitled to twelve peremptory challenges, but it *by no means follows that the state is entitled to six for each defendant.* The state has no rights in the matter beyond those conferred by the statute, and the statute declares that 'in all criminal prosecutions wherein the defendant is allowed peremptory challenges, the state shall also be allowed to challenge without cause any number not exceeding six.' R. S., 1870, Sec. 998. This means, clearly, six in a single prosecution in the trial of a single indictment—without any reference to the number of defendants included in the prosecution or mentioned in the indictment. The language is plain, the case at bar is within its provisions, and we are, therefore, constrained to think the court erred in allowing the number of peremptory challenges by the state to exceed six."

In *Schoeffler* v. *The State*, 3 Wis., 823, the court said:

"Upon the trial of indictments for a capital offense, when there are more than one defendant, each defendant is entitled to challenge twenty-four jurors peremptorily. One or all may be found guilty, and *each one must be regarded as defending for himself.* Not so in regard to the prosecution. The state is prosecuting for one crime, and though several may be guilty of it, all may be included in the same indictment, and thus make one prosecution, or each may be indicted separately. *If, therefore, the prosecuting officer desires to secure to himself six peremptory challenges for each defendant, he should prosecute each separately.* But, while he cannot curtail the right of any defendant whom he may choose to join in the indictment, by adopting a joint prosecution against several, he thereby makes the *state a party, one and indivisible, upon the one hand, and each of the defendants a party on the other.* The right

to peremptory challenges is purely a creature of the statute, and it cannot be extended beyond its obvious purview. We are therefore of the opinion that the court below erred in allowing the prosecuting officer to challenge peremptorily the juror Fairfield, he having already been allowed six such challenges. If the statute should be so construed as to allow the prosecuting officer six challenges for each defendant, *he could multiply such challenges indefinitely by simply increasing the number of defendants.* Such a construction ought not to be allowed, *as it might defeat the very object and intent of the statute.* We do not know, of course, why the prosecution challenged the juror. It is sufficient to know that he was to all appearance competent; that he was acceptable to the defendants, and that the challenge of the prosecuting officer was unauthorized by law."

The possible exception above referred to is the case of *Spies et al.* v. *The People,* 122 Ill., 1, in which eight persons were jointly indicted and tried. In the opinion (*pp.* 264-5) occurs the following:

"The defendants claim that, although they were entitled to one hundred and sixty peremptory challenges yet the state was entitled to only twenty, and they charge it as error that the state was allowed to peremptorily challenge more than twenty talesmen. The statute says: 'The attorney prosecuting on behalf of the People shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to.' (Rev. Stat., Chap. 38, Sec. 432.) We cannot conceive how language can be plainer than that here used. It explains itself and requires no further remark."

The foregoing case is shown for entire frankness, but it appears to stand absolutely alone in its view of the point thus briefly decided; and it has manifestly no general authority.

The plain result is that the number of challenges to the same jury cannot be changed as to any party by joining

the cases under the statute for convenience or economy of trial.

By the error committed in granting the plaintiff below too many challenges it is to be presumed, in the absence of proof to the contrary, that petitioner was injured. An error will not be regarded as harmless unless it affirmatively appears so clear as to be beyond doubt that it did not and could not have been prejudicial.

Deery v. *Cray*, 5 Wallace, 795, 807.
Gilmer v. *Higley*, 110 U. S., 47, 50.

THIRD SPECIFICATION.—RELATING TO THE EXCLUSION OF CERTAIN CONSPIRACY EVIDENCE.

FOURTH SPECIFICATION.—RELATING TO AN INSTRUCTION REFUSED, AND TO A PORTION OF THE CHARGE, AS TO THE PLAINTIFF'S RELATION TO THE DEFENSE OF CONSPIRACY AND FRAUD.

FIFTH SPECIFICATION.—RELATING TO AN INSTRUCTION REFUSED, AND TO A PORTION OF THE CHARGE, AS TO THE BEARING OF THE DEFENSE OF CONSPIRACY AND FRAUD IF THE DEAD BODY SHOULD BE FOUND TO BE THE BODY OF HILLMON.

SIXTH SPECIFICATION.—RELATING TO CERTAIN INSTRUCTIONS REFUSED, TO THE EFFECT THAT A FRAUDULENT CONSPIRACY IN THE PROCUREMENT OF THE POLICY WOULD RENDER THE POLICY VOID.

The errors presented by the above four specifications all have their genesis in the conspiracy and fraud alleged against Hillmon and his associates by petitioner's answer, set forth at the beginning of this brief. The subject can best be considered under a single heading.

The policy of insurance took effect immediately upon its issuance at Hartford, Connecticut, for payment of the first premium was made in advance. It was therefore a Connecticut contract, not under seal, and liable to be defeated in an action of law for fraud in its procurement, precisely as a policy was defeated in *New York Life Insurance Company* v. *Fletcher*, 117 U. S., 519, referred to *infra*.

The majority opinion in the Circuit Court of Appeals (*Rec.*, 2019), contains the following (the italics being ours):

> "During the progress of the trial and in its final charge to the jury, the lower court ruled, in substance, that the defendant company had not averred in its answer that Sallie E. Hillmon, the sole beneficiary in the policy, was a party to the alleged conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin to defraud it and other life insurance companies; that as her connection with the conspiracy had not been averred it could not be claimed that she was a party thereto; that the substantive defense which was pleaded in the answer was that Hillmon was not dead, for which reason no liability had accrued on the policy when the suit was filed; that the principal question in the case was whether John W. Hillmon died, as claimed by the plaintiff, in consequence of a gunshot wound inflicted on March 17, 1879, and that the existence of the alleged conspiracy between Hillmon, Brown and Baldwin was only relevant to strengthen the probability that Hillmon was still living. In various ways *exceptions were reserved to these rulings*, which will collectively form the first subject for consideration.
>
> "It is manifest, we think, from an inspection of the answer, that the trial court was right in holding that the defendant had not pleaded that Mrs. Hillmon was a party to the alleged conspiracy between the three persons last above named. . . .
>
> "It is further manifest that the trial court was right in holding that the fact that John W. Hillmon was not dead when the action was brought, but was concealing

himself somewhere, constituted the substantial defense pleaded in that part of the answer which is quoted above; that the issue tendered by the plea was whether he was dead or alive, and that such issue presented the principal question of fact for the consideration of the jury. It will not be presumed that the second plea contained in the answer *was intended to state more than one defense*, for which reason the first paragraph thereof, which alleges in effect that Hillmon, Brown and Baldwin had entered into a conspiracy to defraud certain insurance companies, among others the defendant, cannot be regarded as stating a substantive defense to the plaintiff's cause of action, but that averment must be treated as being merely introductory to the fact afterwards alleged that Hillmon was not dead. As we construe the plea, this latter allegation constitutes the defense on which the pleader intended to rely. We do not perceive, therefore, that the lower court committed any error in the several rulings last aforesaid, or in making the statement that the existence of the conspiracy between the parties named in the plea was not a controlling issue, but at most was only relevant in so far as its existence, if shown, might tend to strengthen the probability that Hillmon was still living. . . .

"We very much doubt, although it is unnecessary to express a definite opinion on the point, whether the fact that the policy was solicited in pursuance of the alleged conspiracy and with intent at some time in the future to make a fraudulent claim thereunder, would constitute a defense to the action brought by Mrs. Hillmon, who was not alleged to have been a party to the conspiracy when the policy was solicited or to have been in anywise concerned therein. The contract of insurance was founded upon a valuable consideration. It was not an unlawful contract. Mrs. Hillmon had a well recognized insurable interest in the insured life, and it is not claimed that the policy was issued in consequence of any false or fraudulent representations. Under these circumstances it is not apparent that a mere intention on the part of John W. Hillmon to make a fraudulent claim thereunder, which was never in fact made, could impair the beneficiary's right of recovery."

The answer of the defendant was *designed* to present several defenses, with two of which we are now specially engaged: *one* a general traverse, which included a denial that Hillmon *was dead,* and a denial that the corpse presented was his; the *other* a charge of conspiracy to defraud the defendant by the procurement of the insurance upon Hillmon for the benefit of his wife, with the *undisclosed purpose* of collecting the insurance by a false pretense of the death of Hillmon and the presentation of a fictitious body as his.

(1) The first defense involved the identity of the body presented as Hillmon's; and the *fact of a conspiracy would have bearing as evidence on that,* for if the identity were otherwise uncertain, the existence of such conspiracy and purpose would increase the probability that the corpse was fictitious.

(2) The subject-matter of the second defense, namely, the charge of conspiracy to defraud the defendant, and the various proceedings in execution of that fraudulent purpose and conspiracy, were associated with a specific provision of the contract of insurance which is given below.* The assignments of error accordingly presented the subject-matter of this defense in their assertion of its legal effect in at least three aspects, differing from each other merely in their scope and in modifications of outline. They insist:

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* "1st. That the contract between this company and the insured is wholly expressed and contained in this policy, and the application therefore, which is a part of said contract, and a copy whereof is hereto annexed, and that the several answers contained in or endorsed upon the said application, are warranted by the insured and assured to be true in all respects, and *that if this policy has been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same shall be absolutely null and void.*" (*Rec.,* 6.)

(*a*) That the existence of the fraudulent purpose and conspiracy, and the procurement, receipt and acceptance of the contract as steps in execution of that purpose, in legal effect made the contract void *ab initio,* so that no recovery could be had thereon by any one claiming thereunder. (Assignment 89; *Rec.,* 1998.)

(*b*) That if, after the procurement of the contract of insurance under the conditions and with the purpose aforesaid, the parties *entered upon the further execution* of the fraudulent scheme, the contract was void for the fraud, and no right of action could be based nor any recovery had thereon, even *if* it should be true that while actually engaged in the prosecution of the fraudulent and unlawful purpose, or in preparation therefor, the insured did in fact come to his death. (Assignments 88, 92; *Rec.,* 1997, 1999.)

(*c*) That if before the institution of this suit the plaintiff below came to know that the policy of insurance had been so fraudulently procured and with such intent and purpose, and that it had been received and accepted in execution to that extent of such fraudulent design, and that the persons so conspiring together proceeded further in execution of said design, and that the corpse presented was falsely represented to be the body of Hillmon, then by the institution of this suit she thereby adopted, and made in legal effect her own, all the acts performed by the conspirators in furtherance of the unlawful conspiracy with like legal effect as to her as if she had been one of the parties originally conspiring. (Assignments 87, 91; *Rec.,* 1997, 1999.)

It is obvious, therefore, that in legitimate support of these defenses it was important to the defendant to establish the unlawful and fraudulent purpose and the conspiracy therefor averred in its answer.

That a *prima facie* case of fraud and conspiracy was established by the evidence offered was recognized by the Circuit Court in its charge to the jury. It submitted that evidence to the jury. It instructed them that they might consider the evidence bearing upon the fact of such conspiracy; but it limited the application by the jury of the *fact* of such a conspiracy, if it should find one from the evidence, to its bearing upon the identity of the corpse presented, as tending to increase the probability that the corpse so presented was fictitious. The charge to the jury contained the following:

> "If you believe from the evidence that John W. Hillmon, Brown and Baldwin did conspire as charged by the defendants and, pursuant to such combination, the policies of insurance were obtained, and that Hillmon did not die in March, 1879; that is to say, that it was not the body of Hillmon that was brought to Lawrence in the early days of April, 1879, then your verdicts should be for the defendants. Even if you should find that there was no lawful conspiracy or fraud or fraudulent intent as charged by the defendants, but should further find that the body brought to Lawrence as aforesaid was not the body of Hillmon, your verdicts in such event should be for the defendants. In other words, it is not necessary for defendants to prove a conspiracy or fraud or fraudulent intent in order to defeat a recovery. On the other hand, even if you should find that there was a conspiracy between the three men, as charged by the defendants, but should also find that Hillmon died in March, 1879, and that it was his body that was brought to Lawrence as I have stated, your verdicts in such event should be for the plaintiff and against the defendants. In other words, the existence or non-existence of the conspiracy is not the controlling question in the case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse

brought to Lawrence was that of John W. Hillmon, then it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse." (*Rec.*, 1921.)

By effect of this language in its charge, and its refusal to give the instructions upon this subject specifically asked by the defendant, the Circuit Court denied and excluded from the case the second defense presented by the answer of the defendant. The fact of fraudulent purpose and conspiracy as a substantive defense to the contract of insurance, making it void, was thus excluded by the Circuit Court and by the Circuit Court of Appeals, and apparently upon these two grounds; *first*, that plaintiff, the beneficiary under the policy, was not affirmatively charged in pleading as one of the co-conspirators, and *second*, because the plea inadequately presented as a defense the combination to procure the policy for the undisclosed purpose of fraud, and was insufficient to advise the plaintiff that she would meet defense of that character.

The contention of the defendant, the petitioner, is that for the purpose of interposing that defense against the plaintiff it was not necessary to charge her with participation in the fraud or conspiracy at all; that as the beneficiary in the policy the contract was subject to that defense as against her in any event, and that it was clearly so in the present case for two special reasons, first, that the contract contained in terms this express provision, to-wit: "*If this policy has been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same shall be absolutely null and void*" (*Rec.*, 6); and further, that the contract itself was in actual effect not one with the plaintiff but a contract made with Hillmon for her benefit. (*Aetna Life Ins. Co.* v. *France*, 94 U. S., 561, 564.) She derived her only claim through him as a voluntary beneficiary, no consideration

whatever emanating from her. The application was made and signed by Hillmon, and also in conformity to provisions on the face of the policy it was signed with the name of the assured, Sallie E. Hillmon, by Hillmon himself (*Rec.*, 153-4). The contract of the insurance company in this case was, therefore, with Hillmon distinctly, and not with the plaintiff. To the extent to which there may be claimed to be any contract between the insurance company and the gratuitous beneficiary, the plaintiff, it rests upon an assumed agency of Hillmon for her, which she must and does affirm in making any claim under the policy. In any event, therefore, the result is the same; as a contract with her she is bound by its express stipulations; as a contract with Hillmon, the insured, any interest she may have under it must be subject to any fraud that would affect the contract as against Hillmon, and in claiming under such policy she adopts such fraud and makes it her own. Under these circumstances the rule of law establishes that the contract in this case is one directly between the insurance company and Hillmon, and the voluntary beneficiary can claim under it only subject to any defense of fraud that would affect the insured himself. Thus, in *1 Biddle on Insurance*, Sec. 449, it is said:

> "The fraud of the insured would obviously affect a third party who was a payee under the policy."

In *Veazie* v. *Williams*, 8 How., 134, the purchaser of property at an auction sale filed a bill to set the sale aside on the ground that he had been induced to pay an exorbitant price by the fraudulent acts of the auctioneer, in which the defendants, the former owners, were charged to have participated. The answer of the defendants denied that they *or their agent* had participated in the fraud, and the evidence failed to show that *they* had, themselves, in fact done so.

In that connection the court on page 153 said:

> "Though no evidence is seen of fraud practiced by the respondents in person, nor by their express directions, yet a fraud was evidently perpetrated by the auctioneer, as agent for the respondents, or by him in connection with Stephen H. Williams, and the respondents have taken and still retain the benefit of it. This conclusion is indisputable, whatever obscurity or concealment may have been flung over the case by the auctioneer."

After stating that the owners were not liable for the fraud on the ground that they had personally participated in it, the court on page 157 said:

> "But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed in *statu quo;* or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury.
>
> . . . . . .
>
> But the test here is, was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson* v. *Fuller,* 3 Adolph. & Ell., N. S. 68.
>
> The sale, thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration, and take back the mills, or indemnify the purchaser to the extent of his suffering."

In *New York Life Ins. Co.* v. *Fletcher,* 117 U. S., 519, an action brought by an executor of the insured to recover upon a policy was defended by the company upon the ground that false statements had been made in the application. It appeared that the insured, in answer to

questions propounded by agents of the company, had truthfully stated his condition, but that the agents had written false answers in the application without the knowledge of the insured.

Mr. Justice FIELD, in delivering the opinion of the court, said:

> "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. *He would not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed.* The retention of the policy was an approval of the application and of its statements. The consequences of that approval can not after his death be avoided.
>
> The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment he was not called upon to take any steps for the cancellation of the contract. In other words, *the jury were told that the assured might take to himself the benefit of the fraud, without responsibility for it, if he did not discover it until after it was consummated—a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it.*"

In *Aetna Life Insurance Co.* v. *Davey*, 122 U. S., 739, the defense of fraudulent mis-statements in the application, set up by the defendant company in an action by the wife upon a policy of insurance in which she was named as

beneficiary, was entertained without question, although the wife was not charged nor shown to have been a party to the fraudulent mis-statements.

To the same effect are:

Maier v. *Fidelity Mutual Life Ins. Co.*, 78 Fed., 566; 24 C. C. A., 239 (6th Cir.).

Hubbard v. *Mutual Reserve Fund Life Ass'n*, 100 Fed., 719; 40 C. C. A., 605 (1st Cir.).

The principles thus established by express decision of this court and by the Circuit Courts of Appeal for the first and sixth circuits are the same that are recognized and illustrated by the following judgments of other tribunals:

In *Continental Insurance Co.* v. *Insurance Co. of State of Pennsylvania*, 51 Fed., 884; 2 C. C. A., 535 (2nd Cir.), the common agent of four marine insurance companies by fraudulent shifting of risks and effecting re-insurance, caused one company to bear an unfair proportion of losses, resulting in a corresponding gain to another. After discovering the fraud, the company defrauded sued the company for whose benefit the frauds had been committed, and a recovery was allowed, although the latter was in no way responsible for nor aware of the agent's frauds.

The Circuit Court of Appeals in affirming the judgment said:

> "The case is one for the application of the rule that *he who seeks to avail himself of the advantages of the act of another, after knowledge of its fraudulent character, must be held to adopt the fraud, although at the time of the act he was ignorant of it.* The doctrine is elementary, and prevails at law as well as in equity, that a person, though innocent himself, cannot retain an advantage obtained by the fraud of another, in the absence of some consideration moving from himself."

In *Carpenter* v. *American Ins. Co.*, 1 Story, 57; 5 Fed. Cases, 105, a policy was procured from the defendant by the owners of the insured property for the benefit, however, of their mortgagee. They subsequently sold the property and assigned the policy to the plaintiff. In a suit by the plaintiff it was urged that misrepresentations made by the original owners in order to obtain the policy could not be set up in a suit in which the mortgagee was the true beneficiary and innocent of the misrepresentations. The court, by Mr. Justice STORY, said:

> "It is suggested that the misrepresentation was in fact unintentional and without any fraudulent design, and that Epenetus Reed (the mortgagee), for whose benefit the insurance was made, was entirely ignorant of the misrepresentation; and that, under such circumstances, his rights under the policy ought not to be prejudiced thereby. But this suggestion cannot avail for the plaintiff or for Reed. *The misrepresentation made by an agent in procuring a policy, is equally fatal, whether made with the knowledge or consent of the principal, or not.* The ground in each case is the same. The underwriters are deceived. They execute the policy upon the faith of statements, material to the risk, which turn out to be untrue. The mistake is, therefore, fatal to the policy, as it goes to the very essence of the contract."

In *Burruss* v. *National Life Association*, 96 Va., 543; 32 S. E., 49, 50, a policy was taken out by a debtor for the benefit of his creditor. The insured made false representations unknown to the beneficiary. In a suit by the beneficiary upon the policy it was contended that the fraud of the insured could not affect the innocent beneficiary's rights. The court, by HARRISON, J., said:

> "It would hardly be contended that if the insured had taken out this policy for his own benefit his estate could recover it, in the face of the gross fraud shown to have been perpetrated by him in procuring it. There is noth-

ing in the circumstances of the case to place the beneficiary in any better position than the insured would have occupied had the policy been for his benefit. Where insurance is effected upon the life of a third person for the benefit of a creditor, and misrepresentations of materal matters inducing the contract are made by the party whose life is insured, it will vitiate the policy, although the beneficiary was ignorant of such false representations."

In *Baker* v. *Life Insurance Co.*, 43 N. Y., 283, 286 insurance was effected by a husband for the benefit of his wife, and failure to pay upon maturity any premium notes was to forfeit the policy by its terms. Without the knowledge of the beneficiary the husband failed in the payment of such a note, and in a suit upon the policy after his death recovery was denied. The court said:

"The insurance was effected by the husband for the benefit of his wife and as a provision for her in case of his death. *He was the party contracting with the defendants,* and the consideration for the agreement to insure proceeded from him, not from the wife."

Further, on page 287:

"In this case the husband agreed for the insurance and caused his wife to be named as the beneficiary in the policy. It was nevertheless *a contract with the husband*, and the terms and *conditions to which he assented* attached to and qualified the policy and determined the liability of the insurers."

And further, on pages 288-9:

"The case will not be changed, if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and, claiming the benefit of his acts, and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms

and conditions. (*Elwell* v. *Chamberlain*, 31 N. Y., 611; *Bennett* v. *Judson*, 21 *id.*, 238.)"

In *Maynard* v. *Rhode*, 1 Car. & Payne, 360, the judgment of the court is correctly stated in the syllabus, as follows:

> "Where an insurance is effected on the life of a third person by a creditor, and misrepresentations are made by the party whose life is insured, of the state of his health, this will vitiate the policy, though the creditor for whose benefit the policy was effected was ignorant of the representations being false, and though the party did not die of the disease he was then afflicted with."

To the same effect are:

I Biddle on Insurance, Secs. 418-9.

Phillips on Insurance, Sec. 543.

I May on Insurance, Sec. 122.

Bliss on Insurance, Sec. 316.

Joyce on Insurance, Vol. 1, Sec. 646; Vol. 2, Sec. 2652.

Bennett v. *Judson*, 21 N. Y., 238.

Warner v. *Warner*, 46 N. Y., 228.

Smith v. *National Benefit Society*, 123 N. Y., 85.

Estes v. *Life Insurance Co.*, 13 Sup. Ct. Rep., N. Y., 349.

Draper v. *Fire Insurance Co.*, 2 Allen 569.

Forbes v. *Life Insurance Co.*, 151 Ind., 89; 51 N. E., 84.

Atlas Tack Co. v. *Exchange Bank*, 111 Ga., 703; 36 S. E., 939, 942.

The judgment in this case, affirmed by the Circuit Court of Appeals, that the defense of fraud and conspiracy alleged

in the pleading cannot be interposed against the plaintiff in the case unless she is affirmatively charged as a co-conspirator and a participant in the fraud, is, therefore, directly in conflict with rules of law established by this court, and by Circuit Courts of Appeal for other circuits, and which equally prevail in every forum. If the principles and rules announced by this court are supreme and are to prevail, the Circuit Court was wrong when it excluded that subject-matter of defense, and when it confined the application of the fact of fraud and conspiracy to its weight as evidence on the identify of the corpse brought from Medicine Lodge to Lawrence, and when it said to the jury:

> "If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, *then it is unnecessary for you to find whether there was or was not a conspiracy.* The essential point in these cases is the identity of the corpse." (Rec., 1921.)

If the rulings of this court had been allowed to prevail, and in accordance therewith the fraud and conspiracy charged by the defendant had been held admissible as a defense against the plaintiff, then quite apart from the question of identity of the corpse brought to Lawrence it would have been necessary for the jury "*to find whether there was or was not a conspiracy.*" There would have remained a deeper and more important question than that of the identity of that corpse, namely, the question of the fraud that might make the contract void *ab initio* against the plaintiff, even *if* the body were that of Hillmon. It was insisted in the Circuit Court as well as in the Circuit Court of Appeals—and one hardly knows where to begin the argument of a proposition seemingly so self-evident as this—that if the contract of insurance was procured from the insurance company not in good faith but by conspiracy and collusion for the covert and undis-

closed purpose of defrauding the company by the process alleged, and the insured lost his life in the actual effort, with his confederates, to carry out and accomplish the fraud, *no representative of his* could turn about and support an action for indemnity upon that contract. Upon this point we may venture to supply an illustration. Suppose under the circumstances alleged Hillmon and Brown had been at night robbing a graveyard to procure a body to be substituted for, and presented to the insurance company as, that of the insured, and that while engaged in this exploit Hillmon had been shot and killed by the watchman or guard of the cemetery, could it possibly be imagined that the insurance company had ever in legal effect *contracted to pay* under such conditions, or that Hillmon ever *understood* that it had done so? If not, then even if the body produced was that of Hillmon it *was "necessary"* for the jury to find whether there was a conspiracy for the fraud or not; and the statement to the jury was not correct that if the body was Hillmon's they should find for the plaintiff whether there was such a conspiracy or not. So broad a proposition as that of the court,—that if the jury found a contract of insurance expressed in the policy and that the insured was dead, they need look no further; that no fraud or deceit, illegality or crime in inducing the contract, or in the issuance of it, or in the conduct of the parties insured or interested under it, could possibly make the contract void or bar their rights to enforce it,—finds no support in any principle ever yet announced by this court. It is astonishing that it should have received even the suggestion of countenance from the Circuit Court of Appeals. (*Rec.*, 2022.) The fraud was partially consummated, and a wrong and an injury were actually inflicted upon the insurance company, when the conspirators obtained the policy, which manifestly never would have been issued had

the fraudulent purpose to substitute a fictitious body been known by the insurance company.

In *Smith* v. *National Benefit Society*, 123 N. Y., 85, in an action upon a policy the defense was that the insured *in pursuance of a scheme to defraud* the defendant and other insurance companies, procured a large amount of insurance upon his life and then committed suicide. It was held that the contract of insurance was procured, and that the death of the insured occurred, in the execution of a scheme of deliberate fraud upon the insurance companies. The scheme was "to secure a large insurance upon his life appropriate to the payment of his *creditors* and the comfort and support of his *relatives*," and to reach the result by suicide. The scheme was carried out and the insured *died in the act of executing the original fraudulent purpose*. It was held that the contract was void for the fraud, although the plaintiff was a creditor and payee of the policy, and that the suicide was itself an act of fraud upon the defendant; judgment was rendered for the defendant and this judgment was affirmed in the Court of Appeals. In that case also the court had before it a contract of insurance; the insured was dead and there was no dispute as to his identity; but that court did not instruct the jury that it need inquire no further and that fraud upon the insurance company was an immaterial issue.

In *Patterson* v. *Nat'l Premium Mut. Life Ins. Co.*, 100 Wis., 118; 75 N. W., 980, a suit was instituted by the children of the insured upon a policy issued by the defendant upon the life of their father, made payable to his estate and by him assigned to them. One of the defenses interposed was that the insured had "*fraudulently procured the issuance of the policy with intent to commit suicide as a part of a scheme to defraud the defendant out of the sum of $3,000 for the benefit of his children*," and that in furtherance of the

scheme he had committed suicide. *The beneficiaries were not charged as a party to this fraud.* In passing upon this element of the case, the court said:

> "But it is further claimed by the defendant that the evidence tended to show a fraudulent scheme on the part of Patterson, when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing suicide, and defrauding the company for the benefit of his children. Doubtless this would be a good defense, if shown, unless it be cut off by the 'incontestable clause.' It should be a defense not based on the suicide alone, but on the whole fraud, of which the act of suicide was only the ultimate step. But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury."

In *Parker* v. *Des Moines Life Ass'n*, 108 Ia., 117; 78 N. W., 826, an action was instituted by a wife upon a policy of insurance issued by the defendant upon the life of her husband, in which she was named as beneficiary. The sixth defense interposed by the defendant was that the insured had "*applied for and procured the policy in suit with the fraudulent intent to commit suicide.*" Upon this branch of the case the court said:

> "6. The sixth division of the answer set up fraud on the part of Parker in procuring the policy. It was alleged that he secured the same with the intent at the time to commit suicide. It needs no argument to show that *a secret intent of this kind would amount to a fraud;* and, as fraud vitiates all contracts, this defense, if established, *would defeat a recovery* on the policy. Being void in its inception, no rights would accrue under the contract to *any person. Patterson* v. *Insurance Co., supra.*"

We refer also to the following additional cases in the same connection:

Insurance Co. v. *Armstrong,* 117 U. S., 591.

Ritter v. *Insurance Co.*, 169 U. S., 139.
Church v. *Proctor*, 66 Fed., 240, 244-5; 30 C. C. A., 446.
Kingsbury v. *Fleming*, 66 N. C., 524.
Cowen v. *Milbourn*, L. R., 2 Exch., 230.

Nor does it seem possible that the plaintiff should not have been adequately advised by the plea of defendant that she was likely to be met by the contention that there could be no recovery upon this contract of insurance because of the fraud and conspiracy with which it was associated. She brought suit upon a contract of insurance made with Hillmon for her benefit, which expressly provided that if the policy had been obtained by or through any fraud, misrepresentation, evasion or concealment, then it should be absolutely null and void, and she was met by an answer which, among other things, charged that Hillmon, together with Brown and Levi Baldwin, and others unknown, *"procured"* the insurance, *"fraudulently conspiring to defraud the defendant."* The answer also averred "that thereafter in pursuance of the said conspiracy they falsely and fraudulently pretended that Hillmon was dead, and that a certain dead body which they had procured, and had, was the body of the said Hillmon. . . ." With such specific language in the answer it seems impossible to imagine that the plaintiff was not forewarned and advised that the defendant would prove, in support of its answer, the facts thus charged, and previously brought fully to her attention in the "Brown Affidavit," to-wit: the fraudulent scheme and purpose for which the insurance was procured; the unlawful combination and conspiracy of Hillmon and his associates to procure it for that fraudulent purpose; and that in pursuance of that conspiracy and purpose they procured the policies, and then

proceeded to carry the fraudulent purpose into effect by seeking for a body to be presented as that of Hillmon, the insured. Evidence was adduced by the defendant which the charge of the court itself shows to have been sufficient to establish *prima facie* these facts of fraudulent purpose and conspiracy. Of the subject of all this evidence she was adequately forewarned, so that no element of surprise to that point is conceivable, and these are the very facts and this the very evidence upon which the instruction (*Rec.*, 1911-12) was called for by the defendant and refused by the court. The defendant insisted that these facts being proven, there could be no recovery on the contract even if the answer charged also that, in the course of the consummation of the same scheme of fraud, there were additional facts which from the verdict in the case are to be considered as not proven. The failure (if there was one) to establish those additional facts can hardly be such a surprise to the plaintiff as to entitle her to the protection of the court against so much as was proved, and to a judgment upon the contract in the face of the abundantly established fraud and criminal conspiracy with which it was tainted.

In the quotation heretofore made from the majority opinion in the Circuit Court of Appeals, it is said that "it will not be presumed that the second plea contained in the answer *was intended to state more than one defense, for which reason* the first paragraph thereof . . . must be treated as introductory to the fact afterwards alleged that Hillmon was not dead."

The second plea, by which we understand is meant the "2nd" subdivision of the answer (set out in full at the beginning of this brief), contains three paragraphs, and if as a premise, it cannot be presumed that more than

one defense is stated therein, "for which reason" the first paragraph must be considered as introductory to the second, then these two must for the same reason be considered as merely introductory to the wholly independent and disconnected fact alleged by the third paragraph, namely, that the policy was void for non-payment of premiums. The fallacy of this line of reasoning is thus readily apparent. The third paragraph sustains no logical sequence whatever to the other two, so that it clearly appears that the above premise is unsound and that the "second plea" does contain at least two distinct defenses. The reason thus assigned in the opinion for treating the first paragraph of the second plea as "merely introductory" to the second paragraph having entirely fallen, the result falls with it. The second paragraph may be properly regarded either as setting up a separate and distinct defense from the first paragraph, or as specifying facts to explain the general allegation of the first paragraph. Its implications are as much a part of it as its expressions. (*U. S.* v. *Babbit*, 1 Black, 55, 61.)

If it was the right of the defendant to establish in legitimate support of its defenses the unlawful purpose and conspiracy against the plaintiff *at all*, which cannot be doubtful, and is for one purpose conceded, it was then its right in doing so to proceed under all the rules of evidence applicable to the introduction of proof upon that subject. Having established in the court below a *prima facie* case of conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin, defendant offered to prove by the witnesses E. D. F. Phillips, J. H. Blythe, James S. Crew and Alexander Carr certain acts and declarations of Baldwin, one of the alleged co-conspirators, in contemplation of and preparation for the fraudulent purpose and the conspiracy for its consummation, and some of them in furtherance of its exe-

cution. Because the plaintiff was not charged as a co-conspirator, the Circuit Court excluded the evidence, and in that connection said:

> "The acts and the declarations of the conspirators are not admissible for the purpose of establishing the conspiracy; but the conspiracy having been established and a *prima facie* case made, then the declarations or the acts of one conspirator are admissible, *not against a party who is not a party to that conspiracy, but as against each other*, and that upon the theory that the acts and declarations of one of the conspirators are pursuant to the conspiracy, and they must be within those lines; they must be in aid of the conspiracy; then the acts and the declarations of one conspirator in aid of the carrying out of the conspiracy are evidence against the others, *and the application of that would be confined necessarily to a proceeding against one of the conspirators, or a proceeding in which one of the conspirators was a party.* Consequently I believe that the declarations of Levi Baldwin have no proper place in this case." (*Rec.*, 1611.)

Judge THAYER, in delivering the opinion of the Court of Appeals, said:

> "But for other reasons as well the testimony was not admissible against Mrs. Hillmon, who was the sole plaintiff. It was not alleged by the defendant company that she ever became a party to the alleged combination to defraud certain insurance companies, either by original participation in the scheme or by subsequently adopting it, and in the absence of any such averment we are of opinion that it would have been erroneous to have admitted as against *her* such casual declarations and inquiries of the man Baldwin as are above described. Under the issues which were presented by the pleadings we think that the trial court went quite far enough in permitting the existence of the alleged conspiracy between Hillmon, Brown and Baldwin to be shown for the purpose of strengthening the probability that Hillmon was not in fact dead, but was con-

> cealing himself. The existence of the alleged conspiracy was a single isolated fact which the jury might have regarded as having some probative force in solving the real issue in the case as to whether Hillmon was accidentally killed at the time and place alleged in the complaint." (*Rec.*, 2023.)

And upon the same subject Judge SANBORN, in his dissenting opinion, said:

> "The contention that this testimony constituted no evidence against the plaintiff because she was not alleged to be a party to the conspiracy does not seem to me to be sound. There was sufficient evidence of a conspiracy to obtain this policy to defraud the company to warrant the court in submitting this testimony to the jury. If the conspiracy was formed and the policy was obtained by John W. Hillmon, one of the conspirators, in pursuance of a plan that he formed to defraud the company, any assignee or beneficiary of the policy necessarily took it subject to its original defect, and any evidence competent to show that it was originally obtained by fraud must be competent against anyone who holds it, for the policy still has that defect in the hands of the assignee or beneficiary. *National Life Ins. Co.* v. *Minch*, 53 N. Y., 144; *Carpenter* v. *Ins. Co.*, 1 Story, 57; *Burruss* v. *National Life Ass'n.*, 32 S. E., 49; 1 Biddle on Ins., 448-9." (*Rec.*, 2029.)

It was conceded by the Circuit Court that the alleged conspiracy might be proved so as to be used as evidence against the plaintiff bearing upon the identity of the corpse presented. Evidence sufficient to make the *prima facie* case, which is a preliminary condition to the admission of the independent acts or declarations of co-conspirators against each other, was supplied to the satisfaction of the trial court. The right to supplement and reinforce the evidence already in followed of necessity. The proof, sufficient in the mind of the court to make the *prima facie* case, might not dispense in the minds of the jury with the importance

of the confirmatory evidence which the defendant had become entitled to introduce. It was the fact of the conspiracy that was admissible in evidence against her, and the admissibility of the fact of the conspiracy involved the subordinate conclusion that all lawful evidence establishing that fact was of necessity equally admissible. The evidence offered and rejected was evidence of the fact of the conspiracy. Acts and declarations, therefore, admissible to establish the conspiracy between the co-conspirators were admissible in establishing the *fact* which was admissible against the plaintiff. Whether these matters of evidence were admissible against the plaintiff or not was logically involved in the prior determination that the fact of conspiracy was admissible against her at all. A jury not convinced by the *prima facie* case recognized by the court might well have been convinced by the evidence that was excluded of the acts and declarations of one of the co-conspirators.

To show acts of Levi Baldwin to be taken in connection with other independent circumstances and with acts of other persons to prove that he, and Hillmon, and Brown were acting together in the prosecution of a common purpose, the defendant offered to prove the following facts:

That Levi Baldwin had a conversation with Dr. Phillips in October, 1878, in which Baldwin said he was thinking of taking out some insurance, and asked if certain insurance companies were safe; and how long it would take before a dead body would decompose after it was buried; and said, "wouldn't it be a good scheme to get a large amount of insurance on your life and go down south and get the body of some 'greaser' and palm it off as your body and get the money?"

That Levi Baldwin had a conversation with J. H. Blythe,

an insurance agent, in which Baldwin asked him about life insurance, saying that a relative or connection of his wanted to get some insurance, and wanted Blythe to recommend some good company to him. The court had already permitted plaintiff in error to show by the same witness a conversation between Baldwin, Hillmon and the witness, upon the same subject, a few days later.

That Levi Baldwin, in the latter part of February, 1879, had a conversation with James S. Crew, who, as receiver of the Simpson Bank held for collection some notes past due against Baldwin, two of which were secured by mortgage on real estate and one by chattel mortgage on live stock. During this conversation Baldwin said that a part of the money represented by this indebtedness had been furnished to insure Hillmon's life. Crew further testified that he had heard of Hillmon's death in the latter part of March, and that shortly thereafter Baldwin came in hurriedly and told him to let his matter rest, as he was then on his way west after Hillmon's body, and that he had arranged for a portion of the life insurance on Hillmon's life, and that as soon as he got it he would be able to straighten up all his affairs; that he was to have $10,000 of the insurance money.

That, shortly after the 10th of March Levi Baldwin had a conversation with Alexander Carr, during the course of which Baldwin said that "he and Hillmon had a scheme under brogue, and he said that if that worked out all right that he was all right." All this evidence was excluded.

The excluded testimony of all these witnesses shows *motive and inducement* in the state of Hillmon's and of Baldwin's affairs; *preparation* in pondering upon and devising a scheme of relief, and in providing money for the payment of premiums; and shows also what was occupying the mind of the dominant man and principal conspirator.

The rule applicable to evidence of this sort, as stated in 1 Greenleaf on Evidence, Sec. 184a, is universally recognized by all authority.

> "The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence as against each of them. It makes no difference at what time any one entered into the conspiracy. Everyone who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design."

Under this rule all evidence is relevant and admissible, which tends to show motive and preparation for what was done or furnishes indications of what was passing in the party's mind upon that subject.

Stephen's Digest of Insurance, p. 19.

Concurrently with this runs this principle in most cases, that statements or other utterances are admissible where the *material point* is, that under the circumstances *the statement was made*, and not that in itself it was true or false.

1 Greenleaf, Sec. 101.

Mut. Life v. *Hillmon*, 145 U. S., 296, 298.

In that case this court said:

> "Such declarations are regarded as *verbal acts*, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury. *Insurance Co.* v. *Mosley*, 8 Wall., 397, 404, 405. . . . 'So, it is uniformly held that the previous declarations of the testator, offered to prove the *mental facts* involved, are competent. . . . State-

ments and declarations, when the state of the mind is the fact to be shown, are therefore, received as mental acts or *conduct*. 99 Mass., 120.' . . . 'Wherever it is material to prove the state of a person's mind or *what was passing in it*, and what were *his intentions*, there you may prove what he said, because that is the only means by which you can find out what his intentions were. 1 P. D., 451.'"

So Lord Ellenborough said in *The King* v. *The Inhabitants of Hardwick*, 11 East., 578, 585:

"Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co-trespassers; but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the *motives* and *circumstances* of the trespass, will be evidence against all who are proved to have combined together for the common object."

The rules of evidence affecting the admissibility of acts and declarations of co-conspirators are in general the same in civil and criminal cases.

Nudd v. *Barrows*, 91 U. S., 426, 438.

In *Lincoln* v. *Claflin*, 7 Wall., 132, Mr. Justice FIELD defined the rule of evidence applicable to co-conspirators as follows:

"The declarations of each defendant relating to the transaction under consideration were evidence against the other though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs."

In *Wiborg* v. *U. S.*, 163 U. S., 632, 657-8, Mr. Chief Justice FULLER, in discussing the question of evidence applicable to a conspiracy, said:

"There was other evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that: 'If these men were in combination to do an unlawful act, what was

said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition,' and to this an exception was taken. The general rule was stated in *American Fur Co.* v. *United States*, 2 Pet., 358, 365, by Mr. Justice Washington, speaking for the court, that 'where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestae*, may be given in evidence against the others.' The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the motive and intention, *declarations* of those engaged in it *explanatory of acts done in furtherance of its object* came within the general rule and were competent."

In *State* v. *Johnson*, 40 Kan., 266; 19 Pac., 749, the court in defining the rules applicable to the proof of conspiracy, after stating that mere narrations of accomplished facts were not competent, said:

"Instances where a narrative of past events may be admissible can be imagined; but the narrative itself must tend in some way to promote the general purpose of the criminal enterprise. An illustration of such a declaration is given in *Cortez* v. *State*, *supra*, where it is said: 'A. will perform the part allotted to him when B. shall do a certain thing to be performed by him. B. acts, does that which is required of him, and writes to or verbally informs A. that the thing has been done. This is a narrative of a past event, but it is also in furtherance of a common design, and hence admissible. The general rule is that, to be admissible, the conspiracy must be pending, and the acts or declarations must be in furtherance of the conspiracy—the common design.'"

In *State* v. *Rogers*, 54 Kan., 683; 39 Pac., 219, 223, the

defendant Rogers was tried for the commission of the crimes of burglary and arson, and was convicted, from which conviction he appealed. The evidence showed that Rogers, owning books or abstracts of title, had hired one Shirley to steal or burn the public records of title. Shirley in turn hired men to burn the records, and evidence of this hiring by Shirley was introduced by the state and was admitted over the defendant's objection. Concerning this evidence the court said:

> "It has sometimes been said that proof establishing the conspiracy must precede proof of the acts and declarations of a co-conspirator. It is now well settled, however, that the order of proof rests largely within the sound discretion of the trial judge. It often happens that the conspiracy itself can only be proven by circumstances, and, if it is established by the whole evidence in the case, a conviction will not be set aside merely because of the order in which the testimony is presented. Whart. Cr. Ev., §698a; *State* v. *Winner*, 17 Kan., 298; *Place* v. *Minister*, 65 N. Y., 89; Rice Ev., §581. We think the evidence of the negotiations of Shirley with Carroll and others with reference to the perpetration of the crime, was competent to prove the guilt of Shirley, as were also his inquiries for fit persons for such an undertaking. If a conspiracy already existed between Shirley and Rogers by which Shirley undertook to find men who would actually perpetrate the crime for money, *all his acts in seeking instruments were done in pursuance of the conspiracy, and might properly be proven.*"

To the same general effect are:

Cuyler v. *McCartney*, 40 N. Y., 221, 229, 243-4.

Walsh v. *People*, 88 N. Y., 458, 466.

Smith v. *National Benefit Society*, 123 N. Y., 85.

State v. *Thompson*, 69 Conn., 720; 38 Atl., 868, 870.

State v. *Spalding*, 19 Conn., 237.
People v. *Bentley*, 75 Cal., 407; 17 Pac., 436.
State v. *Walker*, 98 Mo., 95; 9 S. W., 646.
Hart v. *Hicks*, 129 Mo., 99; 31 S. W., 351.
State v. *Winner*, 17 Kan., 298.
Spies v. *People*, 122 Ill., 1, 229.

It is sufficient to say that this conspiracy is still pending, and will so continue as long as these suits to enforce the fraudulent contract are being prosecuted by this plaintiff.

Jack v. *Mut. Reserve Fund Life Ass'n*, 51 C. C. A., 36, 45; 113 Fed., 49, 57-58.

Under legitimate application of the rule, the joint participation of all the persons charged may be shown by a number of independent circumstances, each apparently isolated, disconnected and without significance until, when grouped together, they disclose the common purpose which has brought them all into existence. An unlawful combination is generally proved by isolated and distinct circumstances, and, as said by the court, in *State* v. *Spalding, supra:* "In such case, it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination; but, when it is seen in connection with other acts, its true nature may be discovered." Clearly the true nature of these acts can never be discovered if each of them may be individually excluded because its relevancy is not immediately apparent. The principle and importance of the rule is not its advantage to one side or the other in making acts and declarations of one evidence against others, but in that it lets a number of apparently disconnected and detached facts fall into their true relations to each other; enables them to throw light and explanation upon each other; and to show *whether* they *are* detached or are *parts of a combined effort for a common pur-*

pose. The acts of one person alone might not possibly produce the result actually seen, and the acts or declarations of one alone might be apparently without significance and unintelligible, but taken in connection with other acts or declarations of others they become clear, systematic and efficient in relation to the actual event. The evidence here under consideration was relevant and should have been admitted against the plaintiff.

SEVENTH SPECIFICATION.—RELATING TO THE ADMISSION OF EVIDENCE TO DEFEAT THE RELEASE.

After the alleged death of John W. Hillmon on March 17, 1879, and after Mrs. Hillmon, the beneficiary under the policy had seen the corpse produced as the body of the insured, and had been informed by John H. Brown that he had made the sworn statement commonly known as the "Brown affidavit," or "Brown confession," the beneficiary executed and caused to be delivered to your petitioner in Kansas the following release (*Rec.,* 585):

> "LEAVENWORTH, Kansas, Sept. 15, 1879.
>
> In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the Connecticut Mutual Life Insurance Company by reason of policy No. 153,614, issued by said company, dated March 4th, 1881, and for the sum of five thousand dollars, on the life of my husband, John W. Hillmon, and hereby enter satisfaction in full, and order the dismissal of any and all suits or proceedings commenced or that hereafter may be commenced, by any person in my behalf, for the collection of the same.
>
> (Signed) SALLIE E. HILLMON."

Attest:
W. J. Buchan,
John H. Brown.

This release was deliberately executed, with others, by the plaintiff at Leavenworth, in September, 1879, and the plaintiff herself sought to procure the policy for surrender to the defendant. Delivery of the policy to her was refused by her counsel on account of his own claim of interest in it. She subsequently ratified and confirmed her action, and corrected an error in one of the other releases. The above release on its face recited a consideration, and by the law of Kansas in its legal effect imported a consideration. Section 7 of Chapter 21 of the statutes of Kansas of 1868, p. 183, then in force, provided as follows:

> "All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney, *shall import a consideration.*"

This statutory provision, of course, entered into the release and belonged to the constitution of the instrument.

Pritchard v. *Norton,* 106 U. S., 124, 135.

Under this statute, as construed by the Supreme Court of Kansas, the legal effect of instruments thus executed, in respect of their import of a consideration, is the same as that of corresponding instruments under seal at common law.

Northern Kas. Town Co. v. *Oswald*, 18 Kas., 336, 339.

Sprague v. *Mo. Pac. Ry. Co.*, 34 Kas., 347, 353.

Of this proposition there can be no doubt nor any more that the Circuit Court had the subject definitely in mind, for in his charge to the jury it was said:

"While under the law the execution of the written

> instruments of release by the plaintiff *imports a consideration* therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration, and therefore they are inoperative as releases and do not constitute a valid defense, and the plaintiff did not by any of them release or discharge any cause of action or any other right that she may have had." (*Rec.*, 1921.)

The defendant below, claiming that the release was legally valid and effective, set it up in defense by pleading. The plaintiff, deeming the burden of overcoming it to be upon her, *offered it in evidence*, and in the same connection sought to impeach its legal effect. Repeated objections to testimony of this character offered by the plaintiff were overruled and the testimony was admitted subject to numerous exceptions. Having more than once excepted to the court's ruling, it was "not desirable nor seemly for counsel to continually repeat their objections to the same class of testimony." *Salt Lake City* v. *Smith*, 104 Fed., 457, 470 (C. C. A., 8th Cir.).

By this court the rule is established that "in an action upon a sealed instrument in a court of *law*, failure of consideration or fraud in the consideration for the purpose of avoiding the obligation is not admissible as between parties and privies to the deed." *Hartshorn* v. *Day*, 19 How., 211, 222. *George* v. *Tate*, 102 U. S., 564. In both of these cases the question came before this court upon *objection to the admission of evidence*. *George* v. *Tate*, was an action upon a bond in the Circuit Court of the United States for the District of Kansas. The answer admitted the execution of the instrument, but set up as a defense that the defendants had been induced to sign it by false and fraudulent representations. The lower court refused to admit evidence of these representations, and its action was approved by this court as follows (p. 570):

"Proof of fraudulent representations by Myers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected.

It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. *Hartshorn et al.* v. *Day,* 19 How., 211; *Osterhout* v. *Shoemaker and Others,* 3 Hill (N. Y.), 513; *Belden* v. *Davies,* 2 Hall (N. Y.), 433; *Franchot* v. *Leach,* 5 Cow. (N. Y.), 506. The remedy is by a direct proceeding to avoid the instrument. *Irving* v. *Humphrey,* 1 Hopk. (N. Y.), 284."

The rule is well illustrated by the case of *Vandervelden* v. *Chicago & Northwestern Ry. Co.,* 61 Fed., 54, which arose under a statute of Iowa similar to the above quoted Kansas statute, and we quote from the opinion of Judge SHIRAS in that case:

"The point presented for decision by the first ground of objection is whether, in an action at law, a written release of the character of that introduced in evidence can be impeached for fraud not inhering in the execution thereof, but which only goes to the extent of the consideration. . . . By sections 2112 and 2113 of the Code of Iowa, the use of private seals in written contracts, except in case of corporations, is abolished, and it is declared that all contracts in writing, signed by the party to be bound or his agent or attorney, shall import a consideration. Practically, the distinction existing at common law between instruments under seal and those not under seal is thus abrogated in Iowa. The execution of the release being admitted in the pleadings, no evidence is required on part of the defendant to sustain the defense based thereon. Being in writing, and its execution by the plaintiff being admitted, it imports a consideration, and therefore at law its validity is estab-

> lished. . . . Can the plaintiff in this law action attack it on equitable grounds? . . . The release is a validly executed instrument, and in an action at law must be given its full legal force and effect."

Among the objections interposed the evidence was always the one of *incompetency*. At no time was there any ambiguity or uncertainty of any kind as to the precise nature and kind of testimony against which this objection of incompetency was levelled. In more than one instance the inquiry of the court caused the plaintiff's counsel to state explicitly for what purpose the evidence was being offered (*Rec.*, 546, 576-80), and it was in connection with such explicit statements of the purpose of the plaintiff in offering the evidence and with specific objection of the defendant that the record shows the following:

> "The defendants object to the question as *incompetent*, irrelevant and immaterial, and *desire it understood that all testimony upon this subject is under their objection.* The court overruled the objection, to which action of the court the defendants at the time duly excepted and still except." (*Rec.*, 580.)

Although the record shows that there could have been no possible obscurity in the minds of either the court or of counsel as to the ground of objection and the particular character of testimony objected to as incompetent, it was urged in argument in the Court of Appeals that objection to evidence on the ground that it was incompetent, immaterial and irrelevant was not adequately definite to present the point that want of consideration and fraudulent inducement in procuring the execution of a sealed instrument, or of one in legal effect importing a consideration, are incompetent to be shown in a court of law.

In *Noonan* v. *Caledonia Mining Co.*, 121 U. S., 393, 400, Mr. Justice FIELD, discussing this general form of

objection to evidence as "immaterial, irrelevant and incompetent," stated the criticism which is suggested, and also its limitation. He said:

> "The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, *unless it be of such a character that it could not have been obviated at the trial.* The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time *if, under any circumstances, that can be done.*"

Accordingly in *Chapman* v. *Reynolds,* 23 C. C. A., 166; 77 Fed., 274, First Circuit, the court said:

> "Evidence objected to may sometimes be considered on appeal, although the objections were only generally expressed, if *in no event it could be made relevant,* and if, also, the objections to it are *not of a character which could have been obviated* if they had been stated."

It is obvious that under the decisions of this court above cited (*Hartshorn* v. *Day,* 19 How., 211; *George* v. *Tate,* 102 U. S., 564), the ground of the objection was "*of such a character that it could not have been obviated at the trial.*" That ground of objection was the subject-matter of the evidence—its inherent nature—and no "opportunity to obviate" the difficulty in this case could have availed the plaintiff under any circumstances.

Nor could the situation of the plaintiff in that respect be changed or helped by the provision contained in section 8, of the statute of Kansas already referred to. That section is as follows:

> "Section 8. The want or failure, in the whole or in part, of the consideration of a written contract, may

be shown as a defense, total or partial, as the case may be, in an action on such contract, brought by one who is not an innocent holder in good faith."

The law is well settled by this court that state statutes like this of Kansas, which may authorize equitable defenses to be interposed in actions at law in the state courts upon contracts executed in that state, do not apply to the courts of the United States. A statute of Kansas cannot confer upon the courts of the United States power not otherwise possessed by them to entertain equitable defenses in in an action of law, for it cannot obliterate the recognized distinctions of the Federal judicial system between legal and equitable jurisdiction and procedure. The question involved is one of *power* in a court of *law*. What the Circuit Court did in declaring the release void was to exercise equitable jurisdiction. "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity." (*Atlantic Delaine Company* v. *James,* 94 U. S., 207, 214.) Herein lies an additional and a stronger reason why the form of the objection interposed to the admission of the evidence was not material. Indeed, it would not matter if no objection at all had been made in the Circuit Court. If there had been no objection or exception whatever, the Circuit Court had no more authority or jurisdiction to destroy the effect of this release at law, in the manner shown, than it would have had to act upon it directly and to order it also to be delivered up and canceled. Of such an error advantage may be taken at any stage and in any manner. Waiver or consent could not cure it, for it belongs to the class of errors which a court either of trial or of review will notice *sua sponte.* These principles have been repeatedly declared and illustrated in numerous decisions of this court, to some of which we here refer.

Jones v. *McMasters*, 20 How., 8, was a suit at law brought in the District Court of the United States in Texas, possessing Circuit Court powers, to recover possession of a tract of land lying in that state. One of the defenses sought to be interposed was irregularity in survey and location under which the plaintiff claimed. Upon this branch of the case Mr. Justice NELSON, delivering the opinion of this court, said (*p.* 22):

> "The counsel for the defendants claimed the right to inquire into the regularity of this survey and location, and also into the *bona fides* of the transaction.
>
> "It must be remembered that this is a suit at law to recover the possession of the land in dispute; and that, although it may be the course of practice in the courts of the State of Texas, in a suit of this description, to blend in the proceeding the principles of law and equity, in the Federal courts sitting in the state the two systems must be kept distinct and separate. This principle is fundamental in those courts, and *cannot be departed from.* The court, therefore, in a suit *at law, should exclude the hearing and determination of all questions that belong appropriately and exclusively to the jurisdiction of a court of equity.* In a case calling for the interposition of this court, and *turning upon equitable considerations, relief should be sought by bill in equity.* Many of the cases at law coming up from the District Court of this state are greatly complicated and embarrassed, from the want of the observance of this distinction in the proceedings before it. In respect to the survey and location in the case before us, we perceive no ground that could warrant the court in going behind them in a suit at law. They were made by the Government that granted the title, and there is no ground, or even pretence, for saying that they were made without authority; and hence, altogether void. If voidable, for irregularity or other cause, the question was not one for a court of law in an action to recover possession, but for a court of equity to reform any error or mistake."

Greer v. *Mazes*, 24 How., 268, was an action of ejectment brought in the Circuit Court of the United States in California. After the plaintiffs had proved a legal title the defendants offered evidence tending to establish an equitable title in themselves. The court excluded the evidence as incompetent and gave judgment for the plaintiffs. This court affirmed the judgment, and Mr. Justice GRIER, in delivering the opinion of the court, said (*p.* 275):

> "The court below refused to admit the testimony, not for its irrelevancy, but its *incompetency;* because the defendants, claiming under a merely equitable title, having neither survey nor patent, were not in a condition to dispute in a *court of law* the correctness of the survey made by the public officer or resist the plaintiff's proof of legal title."

Sheirburn v. *De Cordova*, 24 How., 423, presented another action brought in the District Court of the United States in Texas to recover a parcel of land in that state. Upon the trial the defendants established title to the land in controversy and judgment was rendered for them. The plaintiff established in himself only an equitable title to the property, but no objection was made in that court on that ground, and the state statute declared such an equitable title sufficient to authorize the maintenance of actions of ejectment. In this court objection was made that the plaintiff could not maintain his suit in a court of the United States upon an equitable title, and upon this ground alone, *although objection was not presented in the court below,* the judgment was affirmed. In the course of the opinion Mr. JUSTICE CAMPBELL said (*p.* 426):

> "The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the

> United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in *Fenn* v. *Holme*, 20 How., 481, that a further discussion is unnecessary."

In *Hurt* v. *Hollingsworth*, 100 U. S., 100, suit was brought in a state court in Texas to quiet title to certain real property, and the defendant removed the suit to the Circuit Court of the United States. The defendant, in his answer, claimed to be the owner of the property, and that the plaintiff wrongfully withheld possession, and he prayed that title might be declared in him, and that he might have judgment for possession and for the value of the rents withheld. The case was considered by counsel and treated by the court as an action at law, and by stipulation of the parties a jury was waived, and the case was submitted to the court both on the facts and the law. A judgment for the title and possession of the property and for damages was rendered in favor of the defendant. This judgment was subsequently vacated and a rehearing granted, whereupon the plaintiff moved to transfer the cause from the law docket to the chancery docket on the ground that it was one seeking equitable relief. In over-ruling the motion the court observed that "it was a court both of law and equity and had cognizance of both kinds of cases; that though the cause was an equity cause the court had cognizance of it, and the question presented was, therefore, simply one of irregularity of pleadings and proceedings; *that the parties had waived all matters of mere form by going to final hearing on the merits and submitting the case to the court;* and that their substantial rights had not been violated by this mode of proceeding." The court thereupon heard the evidence presented and again rendered judgment for the defendant. But in

this court it was held that the motion should have been granted, and the judgment was reversed. In delivering the opinion Mr. Justice FIELD said (*p.* 102):

> "There would be great force in the observations of the court below, if the different causes of action presented by the parties could, by the usual forms of proceeding, either at law or in equity, be disposed of in one suit. It might then very well be said that as by stipulation the case had been submitted to the court for determination, it was too late to object to the form of the proceedings. If it was an equity case, then it was properly before the court; if it was a case at law, a jury having been waived, it was also properly there. In either view, the relief warranted by the facts would be administered. But here no such disposition could be made of the case presented by the petition and the one presented by the answer. The first is strictly a suit in equity seeking special relief, which only a court of chancery can grant. The second is an action at law for the recovery of real property, with the rents and profits. The two cases are entirely different in their nature, and can be determined, where the distinctions between legal and equitable proceedings are maintained, only in separate suits. In the one case, if the allegations of the plaintiff be sustained, the judgment must be declaratory and prohibitory, adjudging that the deed of the sheriff to the defendant constitutes a cloud upon his title, and enjoining the defendant from asserting any claim to the premises under it. In the other case, if the defendant establishes his averments, the judgment must be for the possession of the premises and the rent and profits.
>
> In the Federal courts such a blending of equitable and legal causes of action in one suit is not permissible under the Process Act of 1792, substantially re-enacted in the Revised Statutes, which declares that in suits in equity, in the Circuit and District Courts of the United States, the forms and modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity. 1 Stat., 276, Sec. 2, Rev. Stat., Sec. 913. This requirement has always been

held obligatory upon parties *and the court* whenever the question has been raised. *Thompson* v. *Railroad Companies*, 6 Wall, 134. A party who claims a legal title must, therefore, proceed at law; and a party whose title or claim is an equitable one, must follow the forms and rules of equity proceedings as prescribed by this court under the authority of the Act of Aug. 23, 1842. 5 Stat., 518, Sec. 6."

Burnes v. *Scott*, 117 U. S., 582, was an action at law upon a promissory note, to which was interposed as one defense that the amount due on the note was dependent upon a distribution of partnership assets, which could not be ascertained without a settlement of the partnership affairs. The Circuit Court held this defense to be equitable in character and excluded the evidence offered to sustain it, on the ground that such evidence was *incompetent and irrelevant*. The exclusion of this evidence was assigned for error in this court. Upon this branch of the case the Court, Mr. Justice Woods, delivering the opinion, said (*p.* 587):

"Plainly the relief, if any, to which the facts set up in this plea entitle the defendant is an injunction to stay the suit at law upon the note until a settlement of the partnership and an ascertainment of the amount, if anything, coming to Winston out of the assets of the partnership. This is a remedy which a court of equity only can grant. But the defendant insists on a verdict and judgment in his favor, without settlement of the partnership on which, as he asserts, the validity of the note depends.

Under the jurisprudence of the courts of the United States a court of law can no more take cognizance of an equitable defense than a court of equity can entertain a suit upon a purely legal title."

And further, on page 588:

"If the defense set up in the plea under consideration could be made effectual in an action at law, it would render obsolete in the equity courts of the United States that great head of equity jurisdiction under which in-

junctions are granted to stay proceedings at law. 'The occasion,' says Mr. Justice Story, 'on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances.' 'Thus, an injunction is sometimes granted to stay trial, sometimes after verdict to stay judgment, sometimes after judgment to stay execution, and sometimes after execution to stay the money in the hands of the sheriff,' etc. Story Eq. Jur., Sec. 885, 886, and see Sec. 881, 882; Eden on Injunctions, Ch. 2, p. 3; *Waterlow* v. *Bacon*, L. R., 2 Eq., 514; *Hibbard* v. *Eastman*, 47 N. H., 507; *Hopkins* v. *Fletcher*, 47 Missouri, 331; *Tommey* v. *Ellis*, 41 Geo., 260.

It is clear, therefore, that the matters set up in the third plea were proper for the consideration of a court of equity, *and that they could not be set up as a defense in a court of law.* All the evidence offered to prove them was, therefore, properly excluded."

In *Northern Pacific Railroad* v. *Paine*, 119 U. S., 561, an action was instituted in a state court of Minnesota to recover damages for the taking and converting of certain logs alleged to be the property of the plaintiff. One of the defenses interposed was that the defendant had been fraudulently induced to sell the land from which the logs had been taken; that as soon as the fraud had been discovered the sale had been repudiated by the defendant; and that proceedings were then pending to have the sale set aside. The plaintiff *filed a replication denying the allegations of fraud.* Although this defense was equitable in character, it could be set up in an action at law under the state court practice. The case was removed to the Federal court, a trial was had upon the issues raised by the various pleas, and a judgment was recovered by the plaintiff. In the course of the opinion Mr. Justice FIELD said (*p.* 563):

"The case was then removed, on application of the defendant, from the state court to the Circuit Court of the United States. In that court the equitable defense

could not be made available. In the courts of the United States, to legal actions legal defenses only can be interposed. If the defendant have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity. If his equitable grounds are deemed sufficient, he may thus stay the further prosecution of the action at law, or be furnished with matter which may be set up as a legal defense to it. Upon the removal, therefore, of the action to the Circuit Court, the equitable defense could not be considered. It would have been entirely proper for the defendant to have amended his answer by striking out that portion embracing this defense. But he did not take that course, and the plaintiff relied upon its allegations as evidence. If the pleadings are construed as in the state court, there was an admission by them of an important fact in the case, namely, of title by a deed from the former owner of the lands. In the state courts, where an answer sets up several distinct defenses a denial in one is held to be qualified by an admission in another. . . .

"In the case at bar no proof was offered by the plaintiff of his title to the land, from which the logs in controversy were cut, or of his ownership in any other way, he relying upon the admission to that effect contained in the paragraph of the answer setting up the equitable defense. This defense was not, as already stated, available in the action at law after the removal of the case to the Circuit Court of the United States, and the answer might have been there amended by striking it out; but so long as it remained a part of the pleadings, the fact admitted by it in the state court must be considered as still admitted in the Federal court. No hardship can follow from this rule, for the defendant, by amending his answer after the removal of the cause, can always avoid this result; in many cases it will obviate the inconvenience of making proof of a fact within the knowledge of the parties."

Willard v. *Wood*, 135 U. S., 309, was an action at law instituted in the Supreme Court of the District of Columbia by the administrator of the assignee of a mortgage against

the executrix of a purchaser of the equity of redemption, to recover so much of the mortgage debt as remained unsatisfied after a foreclosure sale. The case was submitted upon an agreed statement of facts, and judgment was rendered for the defendant. This court in affirming the judgment held that the action was equitable in nature and could not be sustained at law. In delivering the opinion Mr. Justice GRAY said (*p.* 314):

> "In the Supreme Court of the District of Columbia, as in the Circuit Court of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law. Rev. Stat. D. C., Sec. 760, 800; *Fenn* v. *Holme*, 21 How., 481.
>
> "A statement of facts agreed by the parties, or, technically speaking, a case stated, in an action at law, doubtless waives all questions of pleading, or of form of action, which might have been cured by amendment; *but it cannot enable a court of law to assume the jurisdiction of a court of equity.*"

Scott v. *Armstrong*, 146 U. S., 499, was an action brought in the Circuit Court of the United States in Ohio by the receiver of a national bank to recover against the makers upon a promissory note. The defendants pleaded as a defense an equitable setoff. Demurrers by the plaintiff to these pleas were sustained and judgment was rendered for the plaintiff. Pending a writ of error to the Supreme Court, a bill in equity was filed in the Circuit Court by the defendants against the receiver, praying for an injunction against the judgment and for an enforcement of the setoff. A demurrer of the receiver was sustained to this bill, and an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. The Circuit Court of Appeals certified to this court for instructions certain questions, one of which was as follows:

> "Has a Circuit Court of the United States, sitting in Ohio as a court of law, *jurisdiction* to entertain a defense of setoff as against an action brought by a receiver appointed by the Comptroller of the Currency to wind up the affairs of a national bank doing business in Ohio because of its insolvency, upon a note held by said bank, which note matured and became payable after the appointment of such receiver?"

This question the Supreme Court answered in the negative, although the Ohio Code of Civil Procedure abolished the distinction between actions at law and suits in equity, and permitted all defenses, both legal and equitable, to be set up in law actions. The court held that the code could not affect the jurisdiction of the Circuit Court of the United States upon its law side. In delivering the opinion of the court Mr. Chief Justice FULLER said (*p.* 512):

> "We are of the opinion that the Circuit Court had *no power* to grant the set-off in question in the suit at law. Judgment, however, was given in that case on the merits upon sustaining the demurrer to the defense of equitable set-off, and as we think that the set-off should have been allowed, we do not feel called upon, having the judgment before us and under our control for affirmance, reversal or modification, to sustain it upon a *jurisdictional* ground not passed upon by the Circuit Court.
>
> "We shall, therefore, reverse it without discussing the question whether, if affirmed, it would or would not be a bar to relief in the suit in equity."

Other cases to which reference may be made in support of the above principles are:

Robinson v. *Campbell,* 3 Wheat., 212.
Watkins v. *Holman,* 16 Peters, 25, 59.
Fenn v. *Holme,* 21 Howard, 481, 484, 488.
Singleton v. *Touchard,* 1 Black, 342, 344.
Foster v. *Mora,* 98 U. S., 425, 428.
Johnson v. *Christian,* 128 U. S., 374, 381-2.
Cates v. *Allen,* 149 U. S., 451, 459.

Mississippi Mills v. *Cohn*, 150 U. S., 202, 204.
Lindsay v. *First National Bank of Shreveport*, 156 U. S., 485, 493.

It is submitted that after the plaintiff in the Circuit Court had admitted the execution of the instrument by her pleading, and had herself voluntarily introduced it in evidence, and had testified that she had executed and delivered it, she was absolutely concluded thereby in this action at law, and could set up no claim of right as against it. The court should not have admitted any evidence impeaching the release, but at the conclusion of the plaintiff's case should have sustained the demurrer of the defendant to the evidence (*Rec.*, 836, 854), and, as requested by the defendant, should in its charge have *instructed the jury to find a verdict for the defendant.* (*Rec.*, 1910.)

EIGHTH SPECIFICATION.—RELATING TO THE "BROWN AFFIDAVIT."

The affidavit or sworn statement of John H. Brown has in many respects been always an important factor in this case. Designated at different times by various names, as the "affidavit," the "sworn statement," the "confession" of John H. Brown, it is found in its connection with the present question at page 1284 of the record. This sworn statement, executed on the 4th of September, 1879, was but the repetition in writing of a statement made orally by Brown to his attorney some months before at Lexington, in Missouri. (*Rec.*, 1230-8.) It was an acknowledgment verified by his oath that he and Levi Baldwin together with Hillmon had conspired to defraud the insurance companies by procuring policies upon Hillmon's life, with the purpose

of collecting the insurance by falsely pretending the death of Hillmon and fraudulently presenting a fictitious body to the insurance companies, and that the body brought from Medicine Lodge to Lawrence and presented as the body of Hillmon was not the body of Hillmon, but a body falsely pretended to be his, in pursuance of that conspiracy. Subsequently, the same John H. Brown made a deposition, which the plaintiff read in evidence on the trial below, wherein he stated in substance that the above affidavit which had been made by him was untrue; and later in the trial, during the cross-examination of a witness called by defendant, the *plaintiff offered* in evidence this affidavit or sworn statement, *generally and without any limitations upon its scope,* and it was so admitted without objection from defendant. (*Rec.,* 1284.)

In due time the defendant requested the court to give to the jury the instruction referred to in the specification. The court refused to give the instruction, to which refusal the plaintiff duly excepted (*Rec.,* 1914), and assigned error thereon in the Circuit Court of Appeals. (Assignment, 105; *Rec.,* 2006.) Having refused the instruction, the court charged the jury as follows (*Rec.,* 1923):

> "The deposition of John H. Brown was read to you on behalf of the plaintiff. On behalf of the defendants evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you. The oral declarations of said Brown not under oath, and the statement signed and sworn to by him, are not affirmative evidence of the truth of any matter therein contained or mentioned, and they should not be considered by you excepting as affecting the credibility of the evidence of the said Brown given in his deposition, and in determining this matter of credibility you should consider the testimony of both sides, showing the circum-

stances under which Brown made said declarations and statement, as well as all other evidence bearing on that question."

A reference to the instruction requested, and to the charge, will show at a glance that both are upon the same identical subject, and are in direct opposition to each other, in that the *one* asks instruction to the jury that the affidavit *having been introduced in evidence by the plaintiff* should be considered evidence against her of the facts therein stated, and the *other*, namely, the charge, instructed the jury that the statement was *not affirmative evidence* of the truth of any matter therein contained. The defendant having carefully reserved exception to the ruling of the court in refusing the instruction asked for upon this subject, it was not then necessary by express decision of the Circuit Court of Appeals for the Eighth Circuit for the defendant to except again to that portion of the charge which embodied a contrary statement of the law. This rule had then been announced by the Circuit Court of Appeals for the Eighth Circuit in the case of *Long-Bell Lumber Company* v. *Stump*, 30 C. C. A., 260; 86 Fed., 574, 582. In that case the opinion of the court, delivered by Judge PHILLIPS, with whom concurred Judge SANBORN, declared as follows:

"In *Evans* v. *Clark* (Ind. T.), 40 S. W., 771, it is held that where the applicant requested the giving of a proper instruction, which was refused, it is not necessary, in order to insist upon error of such refusal, that the party should have excepted to an inconsistent instruction given by the court. The court said:

'Where a party takes proper exception to any matter in the record, it is not necessary to take other exception, if the exception thus taken covers the matter in issue.'

While this is the language of the Court of Appeals of the Indian Territory, it is nevertheless valuable for

the force of the reason assigned. See, also, *Guinard v. Knapp, Stout & Co.* (Wis.), 70 N. W., 671, where the court lays down the rule to be that the refusal to give a correct instruction is reversible error, unless it appears that the same was substantially given in the general charge. Having requested the court to give a proper declaration of law, and the court, by its refusal having declared that it held the law to be otherwise, to which exception was duly taken, why should counsel be required again to except to the converse or modified declaration given by the court? It would be but a repetition of the objection already expressed in the first exception. And, so far from the silence of counsel at the first re-assertion of the error by the court evidencing a waiver of the first error, it but evinces a respectful deportment by counsel towards the court, in refraining from repetitious objections at the ruling of the court, after having once taken exception involving in effect the same principle which would be represented in the second exception."

In the above case Judge THAYER dissented but without specific reference to the point in question. In the present case a precisely opposite position is taken by the majority of the court upon this subject. In its opinion in this case the court said:

"We are *relieved, however, of the necessity of deciding* whether there was anything misleading in the excerpt from the charge which has been quoted above, *by the fact that no exception was taken* thereto, and we may reasonably infer from the fact that no exception was taken, that the direction given by the court that Brown's sworn statement to the defendant's attorney was not *'affirmative evidence,'* etc., was not deemed to be of much importance or as liable to mislead, when the case was submitted to the jury."

It is plain that the language of the Circuit Court in its charge to the jury is in direct opposition to the rule of law asserted in the instruction refused by the Circuit Court, and that the Court of Appeals refused to consider the objection of

the defendant to the rule of law expressed in the charge because separate and independent exception had not been taken to the charge itself. We submit that any criticism of language which would make the instruction asked by the defendant and the charge presented by the court otherwise than the precise antitheses of each other is verbal and without substantial foundation. The interpretation of the language of that instruction presented by Judge SANBORN in his dissenting opinion, we submit to be correct and to state the manifest purport of the language employed.

In his dissenting opinion upon this point Judge SANBORN said:

> "A perusal of this brief statement of the record upon this subject will not, it seems to me, raise a doubt in the mind of any reader that the question presented by the request, that ruled by the charge and that decided by the refusal to grant the request was the single question whether or not the affidavit of Brown was any evidence of the facts it recited. This, it seems to me, was the only question intended to be raised by the request, was the question which the charge clearly shows that the court understood was presented and was the only question ruled either by the refusal of the request or by the terms of the charge upon this subject. If this view is correct, the exception to the refusal to grant the request fairly presents the ruling upon this issue.
>
> . . . . . .
>
> The request and the charge seem to me to fairly present one and only one question which was clearly understood and directly ruled by the court both in its charge and in its refusal to grant the request, the question whether or not the affidavit was evidence of the facts it recited. In the light of the charge, which contradicted the terms of the request, the refusal of the request ruled this question as directly as the charge itself, and for that reason the exception to the refusal fairly challenged the error and entitled the defendant to a review of the ruling.

When we turn to a consideration of the correctness of the ruling itself no issue is presented for argument or consideration. Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give to the opposing party the opportunity and right of cross-examination and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of such evidence have this effect for he who introduces testimony is ordinarily in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence and the defendant consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited because the defendant relied, and had the right to rely upon it for that purpose and because the plaintiff having introduced it was not permitted to take the inconsistent position that it was not competent evidence of the facts it related. *Walton* v. *Chicago, St. P., M. & O. Ry. Co.*, 56 Fed., 1006, 1008; 6 C. C. A., 223, 225; 12 U. S. App., 511, 513; *National Loan & Investment Co.* v. *Rockland*, 94 Fed., 335, 337; 36 C. C. A., 370, 372. The affidavit was persuasive telling evidence upon the crucial questions in the case, upon the identity of the corpse and upon the conspiracy to defraud the defendant, and yet the company was deprived of its benefit by this ruling of the court. This error is so plain and glaring, and it necessarily deprived the defendant of such important testimony that in my opinion it ought not to be disregarded."

We do not understand the suggestion that exception to the language of the charge was omitted because the matter "was not deemed to be of much importance, or as liable to mislead." The importance of the issue to the plaintiff is vividly illustrated by the language in the dissenting opinion just quoted; and the point had, under the rules of the court then

in force, been effectively preserved by the careful request of an instruction and by exception to its refusal. It is obvious that whether one rule of procedure or the other should determine, the right of the petitioner has depended not upon any principle or rule settled in the Circuit Court of Appeals of the Eighth Circuit, but upon mere hap and chance in the composition of the court; so that the rule announced one day upon which litigants are presumed to rely is announced to be otherwise on another day, and they are caught in a situation where their gravest interests are involved and overturned and into which they are presumably led by following a path declared by the court to be legitimate and correct.

The fact that the Brown statement was unequivocally offered in evidence by the plaintiff was obscured if not effectively mis-stated by the court in its charge. The statement was put in evidence without qualification or limitation of its scope by the plaintiff under the circumstances shown by the record. When a party calls a witness he represents him as worthy of belief and assumes responsibility for the truth of his statements. The deposition of Brown had already been offered and read in evidence by the plaintiff, and when afterwards, at a later stage of the trial, the plaintiff put in evidence, and the court admitted without objection, the sworn statement of the same witness, the plaintiff then represented the witness to be credible as to that statement, assumed the responsibility for his veracity and became estopped to impeach his allegations.

1 Greenleaf Ev., Sec. 442.

It is insisted, therefore, that the court erred in its declaration to the jury that the statement signed and sworn to by Brown was not affirmative evidence of the truth of any matter therein contained, and in limiting the effect of that sworn

statement to its bearing upon the credibility of the evidence of Brown given in his deposition. It is the contention of petitioner that in its bearing upon the credibility of the witness Brown in his deposition, the affidavit is to be considered by the jury not merely as *qualifying* that credibility, and in determining which of the two, namely, the deposition or the affidavit, shall be given the greater weight, or how much of either it will believe, but that, having been thus introduced in evidence affirmatively by the plaintiff at a later stage of the trial, it *absolutely destroys* the credibility of the witness as to the deposition, and concludes the plaintiff as an admission against interest (1 Greenleaf Ev., Sec. 147) wherever the deposition is contradicted by the affidavit. The affidavit being introduced by the plaintiff at a later stage of the cause, and the deposition having been also introduced by the *plaintiff*, the situation is not the same as it would have been if, to qualify the credibility of the witness, various conflicting statements at other times had been put in evidence by the *defendant*. As against the plaintiff the credibility of the witness Brown in his deposition is not merely qualified or impaired but absolutely destroyed, and the deposition is superseded by effect of the admission of the plaintiff in the statement sworn to at Parkville. As affecting the credibility of Brown, therefore, in his deposition, the sworn statement is *conclusive* upon the plaintiff; and if that be so, it is then conclusive of the case and should conclude this litigation.

It is the contention of petitioner that the statement sworn to at Parkville is evidence against the plaintiff as to all things alleged in it to precisely the same extent as any part of John Brown's deposition read on the trial.

In another aspect this sworn statement or affidavit is evidence of high character and of great importance. The fact

that under the conditions of the time such an affidavit came into existence is an independent circumstance competent to be proved and considered in its connection with other circumstances which may be correlated with it. The affidavit is evidence to prove the *fact* that Brown *made* it, and that fact is as competent evidence as the fact of his flight, and is of the same character. It is original and primary evidence that he made it, and that he *made* the allegations which it contains. Whether the things alleged were true or not is another matter. Evidence of such allegations is often competent where the material point upon which the evidence is offered is that they were made, and not whether they were true or false. The affidavit and the allegations thus made may, nevertheless, derive credence from other circumstances with which they fall into connection, or they may reciprocally confirm or explain or give significance to other circumstances appearing independently, and in such connection the allegations of this affidavit may become entitled to great consideration and weight as evidence. This principle finds ample illustration and confirmation in this record. That the statements made at Lexington at the beginning of May or in April were the same in substance as those contained in the Parkville affidavit made in September is confirmed by the trouble Levi Baldwin had to procure his "proofs of death" in the interim. His own testimony confirms Brown's statement that he had to go several times to Missouri to obtain them from Brown, and that he got them by great importunities. He learned inevitably on those occasions that Brown had already admitted that the body was not Hillmon's. (*Rec.*, 696, 714, 717-19, 1234-5.) So from the subsequently developed testimony of Marshall and Helda and Mesh and Healey (*Rec.* 1403, 1417-18, 1430, 1561, 1575), and the letter of Walter's (*Rec.*, 1689), comes fur-

ther confirmation of the affidavit of Brown concerning the third person taken with them from Wichita, together with the other evidence in the case that the man dead at Medicine Lodge was a stranger and not Hillmon; and still further confirmation comes from the curious correspondence between that expectation mentioned in Brown's affidavit of finding on the plains a subject which would appear to be Hillmon frozen to death, and which could be identified only by the clothes and paper found on it (page 63 *ante*), and that suggestion of Baldwin's to Dr. Phillips (sought to be shown in evidence, but excluded by the court) that one might "go down south and get the body of some 'greaser'" and palm him off on the insurance company when no longer recognizable. (*Rec.*, 1606.) *Might Baldwin also have suggested that to Brown as well as to Dr. Phillips?*

By this correspondence between the sworn statement or affidavit of Brown and the excluded testimony of Phillips, the importance and value of both to the development of the truth is *illustrated;* and the truth of the statements of the affidavit in these respects, and that of the excluded testimony of Phillips and of the testimony of Marshall and Helda and Mesh and Healey, and of the indications in Walter's letter, and the evidence of the identity of the body at Crooked Creek as that of some stranger and not of Hillmon, are all reciprocally confirmed.

NINTH SPECIFICATION.—RELATING TO THE EXCLUSION OF PART OF MCKAMY'S TESTIMONY, AND OF THE TEXAS CRIMINAL STATUTE, AND TO THE INSTRUCTION REQUESTED IN REFERENCE TO THE BEARING OF THE CRIME COMMITTED BY HILLMON IN TEXAS.

The defendant on the trial below proved that Hillmon and Brown were living on buffalo ranges in the winter of 1877 and the winter and spring of 1878, and were engaged in hunting buffalo and selling their hides. They were brought in the course of these transactions into relations with the members of a trading firm known as McKamy & Anderson, located at Fort Griffin, Texas, having also a store known as the Pease river store at the head of the Pease river and at the foot of Stake Plains, and in the course of their dealings with McKamy & Anderson they finally bought of that firm a cattle train, consisting of thirty-three yoke of oxen and nine wagons. For this purchase they gave to the firm the notes of Hillmon and Brown, three in number; one for $900 and the other two for $1,361.95 each. To secure the payment of these notes they executed under the laws of Texas a chattel mortgage upon the cattle and wagons purchased, and upon some buffalo hides alleged to be then lying at some other point in Texas. (*Rec.*, 369-380, 1389-1400.) A statute of Texas then in force provided as follows:

> "If any person has given, or shall hereafter give, any mortgage, deed of trust or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the state, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the petitentiary not less than two nor more than five years." (*Rec.*, 1400.)

Of this statute the court will take judicial notice. The notes were never paid. Having thus acquired the possession of this cattle train, Hillmon and Brown moved out with it on the plains of Texas and never afterward returned. (*Rec.*, 1389, 1400.) On the contrary, they proceeded directly to run this mortgaged property out of the State of Texas. (*Rec.*, 1097.) They took it into New Mexico, and then selling portions of it as they went along, they conducted the rest into Colorado, and finally sold the last of it at Trinidad and at Pueblo. (*Rec.*, 372-6.) The defendant also proved by the testimony of the city marshal of Lawrence that in the fall or winter of 1878 Hillmon was drawn to his attention by a communication from Fort Griffin, Texas, and that that communication contained an enclosure of some sort. (*Rec.*, 1007.) In addition to this, the defendant sought to prove and offered evidence to prove, that when McKamy & Anderson learned that this cattle train had been moved up toward the Pecos river and was about to be carried out of Texas, he set out in pursuit; that McKamy, following along the trail, found at Las Vegas and elsewhere portions of the property which had been sold, but that Hillmon and Brown had gone to Kansas; that thereupon McKamy, from Trinidad, Colorado, sent to Texas to have necessary papers forwarded to him so that he might procure the arrest in Kansas of Hillmon and Brown, but that before the papers reached him he read in the newspapers that Hillmon had been killed in Barber County, Kansas, and presuming that statement to be correct he returned to Texas. This evidence when offered was excluded by the court. Defendant also sought to prove the substance of the communication by which Hillmon was brought to the attention of the city marshal in the fall or winter of 1878, and what was the

enclosure received by the marshal from Fort Griffin, Texas. This also was excluded by the court. (*Rec.*, 1007.)

Petitioner claims that the facts which would have been shown by this excluded testimony should have been admitted in evidence. They were competent evidence to prove not merely the financial condition and circumstances of Hillmon, but also to show the character of Hillmon and Brown, both of whom are charged as conspirators by the pleadings, and that at this point of time they were criminals under the laws of Texas; and furthermore, it was competent evidence to prove an adequate motive on the part of Hillmon for going away at that time and disappearing from Kansas, and for concealing himself and keeping himself concealed, *apart from any other motive* whatever. A rule of law applicable in this connection was in terms recognized by the court, for after instructing the jury that Hillmon's continued absence might be taken into consideration by them as *evidence of his death*, the court said:

> "If it appears that a motive may exist for absence and a continuance thereof and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show *death.*"

(*Rec.*, 1920.)

But at the same time the court arbitrarily excluded from the knowledge of the jury the very evidence that would have furnished an adequate explanation of his absence. The defendant below had proved what Hillmon had done in the matter of this cattle train. It sought to read to the jury the statute under which what they had done was a violation of the criminal laws of Texas. This especially in connection with the inquiry about Hillmon which had come to the city

marshal at Hillmon's home, furnished adequate explanation for Hillmon's disappearance and concealment.

Sensenderfer v. *Pac. Mut. Lf. Ins. Co.*, 19 Fed., 68, 70.

N. W. Mut. Life Ins. Co. v. *Stevens*, 71 Fed., 258, 262.

Davie v. *Briggs*, 97 U. S., 628, 633.

Tisdale v. *Mut. Benefit Assur. Co.*, 26 Ia., 170.

TENTH SPECIFICATION.—RELATING TO THE EFFECT TO BE GIVEN LAPSE OF TIME AS EVIDENCE.

This action was begun on July 13, 1880. The petition alleged that Hillmon, the insured, was killed on the 17th day of March, 1879. To support the action, therefore, the plaintiff was bound to prove affirmatively the contract of insurance; the payment of all premiums that had accrued under its conditions; that Hillmon was dead when the action was brought; and that he died at the time alleged in the pleading. The primary point of objection in this specification of error is that the length of time which had elapsed at the last trial had no tendency to show that he died on the 17th of March, 1879, nor that he died before the second premium under the policy became payable; (for the payment of but one premium is proven, and there is no pretense of the payment of another); nor any more tendency to show that he was actually dead when the action was brought.

Hillmon paid an advance premium upon the policy before it was issued, and this payment kept the policy alive for a certain period when by its terms the insurance would expire for non-payment of further premium. (*Rec.*, 147, 153.) Plaintiff had no

right of action upon the policy unless Hillmon died *before* the expiration of *that* period. Proof of his prior death was an essential and vital element of her case. In her pleading she alleged that he died March 17, 1879, at Crooked Creek from a gunshot wound inflicted by John H. Brown, and at the trial it was not contended that, if dead at all, he died at any other time or in any other manner. It was conceded that a man was killed by a gunshot wound at the time and place alleged, but it was denied that Hillmon was that man, and upon this branch of the case the question to be tried by the jury was one of identity.

The only direct evidence of the occurrence on March 17, 1879, came from the mouth of Brown, who testified that he accidentally shot Hillmon; but Brown had previously made affidavit that it was not Hillmon at all who was killed, but that it was a man whom Hillmon had murdered with intent to have the body presented to the insurance companies as the body of Hillmon; and it was evident to all concerned in the trial that Brown was not entitled to the slightest credence. Eliminating his testimony, all the evidence produced by the plaintiff tending to show that Hillmon died at the time and place alleged in her pleading, bore upon the *identity of the corpse* found at Crooked Creek. In opposition to this the defendant not only introduced a mass of evidence which of itself was clearly sufficient to establish that the corpse was *not* that of Hillmon, but also gave evidence sufficient in itself to establish that the corpse was that of a man murdered by Hillmon in furtherance of the fraudulent conspiracy set up in the pleading. Upon plaintiff's evidence, standing alone, it appeared that Hillmon was killed as alleged; upon defendant's evidence, standing alone, it was indubitable that he was *not* killed as alleged, and that when last seen he was engaged in carrying out a criminal

fraud, for whose consummation murder and concealment were necessary. In this state of the proofs, the fact that Hillmon had not been seen nor heard from since March 17, 1879, could not serve as cumulative evidence in favor of either contention, for it was perfectly consistent with both. It became entirely immaterial upon the question of the identity of the corpse. It lent no more weight to plaintiff's assertion that Hillmon died at Crooked Creek than to defendant's theory that he was in that voluntary concealment which was necessary to the consummation of the fraud and conspiracy proved against him, and which was also necessary to avoid punishment for the murder done there by him.

In its charge upon this point the Circuit Court called the jury's attention to the legal presumption arising from seven years *unexplained* absence, though such a presumption was entirely foreign to the facts of the case, which exhibit no *unexplained* absence.

The attention of the court has already been drawn in the argument of the preceding specification of error to the fact that Hillmon had ample reason and abundant motive for disappearing when he left Lawrence in the winter of '78 and '79. The criminal law had prepared for him five years of a Texas penitentiary, and the shadows of its opening doors were darkening about his feet at that moment. Moreover, if the allegations in this case of conspiracy and fraud on his part are true, if the statements of John Brown at Lexington and Parkville were true, if in any event the man killed at Crooked Creek was not Hillmon—then his participation in murder as a principal or accessory, and the existence of these suits, furnished adequate explanation of his continued absence.

As was said in *Northwestern Mut. Life Ins. Co.* v. *Stevens*, 71 Fed., 258; 18 C. C. A., 107:

> "It goes without saying that if a guilty man, who has been indicted for a heinous crime, flees in the full vigor of health from impending disgrace and just punishment, and his friends and acquaintances hear from him no more, the inference of continued life after the expiration of seven years might well be drawn, and no presumption could arise from that state of facts that his life had ceased within that period."

The court told the jury in the same connection that Hillmon's absence might be considered with the other evidence relating to his death as tending to show that he died *at the time and place* alleged by the plaintiff, subject to be weakened by a motive, if any, for a voluntary concealment. The charge in effect asserted that the absence constituted evidence of the death as claimed, adding its weight to the sum total of plaintiff's evidence upon the point to be overcome by the defendant. The jury must have taken it to mean, especially in view of the misleading and unnecessary reference to legal presumptions, that the mere fact of absence was to be given a value and weight in favor of plaintiff's contention and against that of defendant which it obviously did not have, and this in the minds of the jury may have turned the scales of the evidence and given the preponderance to plaintiff. The charge embodied a statement of law directly contrary to that contained in the instruction requested by the defendant, which was refused and duly excepted to (*Rec.*, 1909), and under the decision of the Court of Appeals in the Eighth Circuit of *Long-Bell Lumber Co.* v. *Stump*, 86 Fed., 574, it became unnecessary to except to the charge as given.

At the time of the trial more than twenty-one years had passed since the death of the man who was shot at

Crooked Creek. The voluntary language of the court concerning a presumption of death arising from an unexplained absence of seven years tended to give that suggestion an unjustifiable introduction into the case, and an unjustifiable influence upon the mind of the jury. It was impossible for the jury to listen to this portion of the charge, woven in and connected with the instruction as to unexplained lapse of time becoming evidence of death, without conviction that the intimation of the court was intended to add the weight of a legal presumption to whatever impression might otherwise be gathered from the lapse of time up to the date of trial, but the suggestion of such presumption was distinctly foreign to the case and the situation. *No presumption from any lapse of time had arisen when this suit was brought, and the plaintiff must recover upon the conditions existing then or not at all.* Moreover, nothing is established with more certainty than that even after a lapse of time sufficient to permit under any circumstances a presumption of death to arise, there would still be no presumption that the death had occurred at any particular time or place. There was no presumption whatever of death before any of the unpaid premiums accrued, or before the commencement of the action; and the plaintiff could not recover, even upon an absolute proof of death after the action had been begun. In fact, it has been held that the established presumption of fact from the disappearance of an individual under ordinary circumstances, is that he continues to live for seven years after his disappearance. *N. W. Mut. Life Ins. Co.* v. *Stevens,* 71 Fed., 258; 18 C. C. A., 107. Lapse of time, therefore, since the death alleged in the petition "is an immaterial matter in this case" utterly, and the substance of the instruction asked should not have been refused. Particularly, after the de-

fendant had requested the court to give a proper declaration of law upon that subject, the court should not have given to the jury the instruction and misleading suggestion embodied in that portion of the charge set out in this specification of error. It would be impossible for ingenuity to devise anything more calculated to confuse the thought and mislead the minds of the jury than the apparent intimations involved in the suggestion of the court upon this subject.

The unexplained absence of a man from home and friends for more than seven years, during which no tidings of him have been received by those who, if he had been living, would naturally have heard from him, gives rise to the legal presumptions that the absentee *continued to live during* the first seven years of the absence, and that *after that time* he was dead. The presumption of death will sometimes arise upon a shorter absence, such as when at the time of disappearance the absentee was in desperate state of health, or was in imminent peril of his life; *but in no case is there any legal presumption as to the particular time of death.* Moreover the presumption of death is a mere limitation of the presumption of the continuance of life, and can only arise in a case where there is an entire absence and dearth of proof upon the subject. Where there are facts and circumstances shown, sufficient in themselves to account for the absence, there is no basis for any legal presumption, and none arises, and the party asserting the death must establish it by affirmative proof. And apart from legal presumptions, it would seem to be clear that where evidence is produced which standing alone exhibits a powerful motive for voluntary disappearance and concealment, no inference of fact as to death can be drawn from the absence. In such case there is no more basis for an inference of fact than for the presumption of law. *Then* the negative circumstance of

absence has no probative force whatever—no logical or evidential value—upon the question whether that absence should be ascribed to death on the one hand or to the motive for concealment on the other.

It is submitted that the following authorities support the proposition that the requested instruction should have been given and that the instruction as given was erroneous:

Davie v. *Briggs*, 97 U. S., 628.

Fidelity Mut. L. Ass'n v. *Mettler*, U. S., ; 22 S. C. R., 662.

N. W. Mutual Life Ins. Co. v. *Stevens*, 71 Fed. Rep., 258; 18 C. C. A., 107.

Montgomery v. *Bevans*, 1 Sawyer, 660; 17 Fed. Cas., 628 (by Mr. Justice FIELD).

Cone v. *Dunham*, 59 Conn., 145.

Ray v. *Mut. Benefit Co.*, 174 Pa. St., 1; 34 Atl. Rep., 283.

Schaub v. *Griffin*, 84 Md., 557; 36 Atl. Rep., 443.

Whitely v. *Equitable Life Society*, 72 Mo., 170; 39 N. W. Rep., 369.

Seeds v. *Grand Lodge*, 93 Ia., 175; 61 N. W. Rep., 411.

Watson v. *England*, 14 Sim., 28.

In re Phene's Trust, L. R., 5; Chan. App., 139.

1 Taylor on Evidence, Sec. 200.

1 Greenleaf on Evidence, Sec. 41.

Lawson on Presumptive Ev., pp. 251-298.

ELEVENTH SPECIFICATION.—RELATING TO THE REFUSED INSTRUCTIONS ABOUT HILLMON'S TEETH.

In the nature of things the permanency of the teeth furnishes oftentimes the most unmistakable indication and surest evidence of identity. In this case one thing is established and without controversy—that the teeth of the man whose body was brought from Medicine Lodge were extraordinarily large, perfect and brilliant, and constituted a most striking and noticeable feature. A model of them made by one Dr. Patterson, a dentist, was produced in evidence and by a special order has been sent up from the Circuit Court. (*Rec.*, 128, 236.) Sallie E. Hillmon, the plaintiff, stated that the teeth of her husband were good. (*Rec.*, 748.) The woman with whom Sallie E. Hillmon lived, Mary Judson (*Rec.*, 531), and her son, Arthur Judson (*Rec.*, 825), testified that they observed no defective or missing teeth; and one Dr. Simmons (*Rec.*, 215) says the same concerning them in 1873. No other witness testifies that his teeth were good. On the other hand a cloud of witnesses testified that they were imperfect and decayed. Some on various occasions when camping or herding cattle had inspected them and ministered to him when suffering from toothache. They seem to have been an inconspicuous feature with him. Among those who testified to their defective condition were a dentist who had treated him, some personal acquaintances and associates, two of his own brothers and his sister and her husband. A list of these witnesses with references to the pages of the record upon which their testimony is shown is given in connection with this specification of error. The weight of the evidence is conclusive; the fact proven was in its nature conclusive, as an element of

identification, or of differentiation between Hillmon and the body brought from Medicine Lodge; and the instruction asked in this specification should not have been withheld from the jury.

In Underhill on Criminal Evidence, Sec. 317, it is said:

> "The structure and condition of the teeth of a deceased person, by reason of the imperishable nature of the materials which compose them, furnish an excellent means of identification. Any witness who was acquainted with the appearance and conformation of the teeth of the person in question may describe their condition of soundness or decay, and point out whatever he may have observed which was abnormal or peculiar in them, as, for example, fillings, etc. This evidence may then be followed up by the testimony of experts, preferably dentists or dental surgeons, who have made an examination of the teeth after death. The jury may then determine as an inference from the points of similarity, if any, the identity of the remains with the person whose death is under consideration."

TWELFTH SPECIFICATION.—RELATING TO THE EXCLUSION OF EVIDENCE SHOWING RECOGNITION OF PHOTOGRAPHS OF THE CADAVER AS PHOTOGRAPHS OF YOUNG WALTERS.

Supervening upon the letters of Frederick Adolph Walters, written from Wichita on the eve of Hillmon and Brown's departure upon their last expedition, tending to show that Walters went with them, and upon the evidence of other witnesses to the same effect, is an important body of evidence tending to identify affirmatively the body brought from Medicine Lodge as that of Walters. Photographs of that body were taken at the instance of the defendant below, and this evidence lay chiefly in the identification of these photographs. The photographs themselves have by special order been sent up with the record and are before this court. Among those

who identified the body by these photographs were many of the friends and acquaintances of Walters at Fort Madison. Bucholz, the barber there, had known him from childhood, and was from five to seven years older. He says, "The expression shows for itself that it is Adolph Walters," and further, "I have shaved him for five years . . . and I know that photograph is nobody else but Adolph Walters." (*Rec.*, 1704.) In this connection we may recall the language of the court below in its charge that:

> "The causes and reasons why human beings recognize one another with whom they are acquainted do not generally depend upon analysis of separate features, but *rather upon general appearance, in which many elements combine*, and it is, therefore, immaterial if a witness, when called upon to describe in detail the features of a party whom he is identifying, differs in some of these details from others, *if he is able to say that as a whole he recognizes the person by his general appearance.* The act of recognizing between friends and even members of the same family may not depend upon the color of the hair, the condition of the teeth, the size or shape of the nose or any independent feature, but upon *the individual appearance* of the person as it *makes an impression upon* the mind or brain of the observer." (*Rec.*, 1924.)

Rourke had known him intimately and seen him almost daily from 1864 to 1870, and saw him with great frequency from that time on. He says he recognized it as the photograph of Walters when first he saw it, before he knew that Walters had died, and he recognized it "from the general appearance of the countenance in the picture." (*Rec.*, 1719-20.) D. W. Henry had known him from boyhood. Looking at one of the photographs and questioned whether he recognized the person, he said: "Yes, sir; I do, and that is poor Frederick Adolph Walters; *I can't be mistaken.*" (*Rec.*, 1725.) He further said: "I recognize it by the

general features of the man; there is something I cannot explain about it, but it is the general features of the man." In his testimony, and in that of William Schott and H. F. Stemple and others, will be found vivid descriptions of Walters in his life, which correspond with the appearance of the figure shown in the photographs.

In addition to the evidence of these acquaintances, all the members of Walters' family, his father, his brother and his swo sisters testified to their unanimous recognition of the photographs (*Rec.*, 1622, 1746, 1783, 1799), and in that connection happened the occurrence which the defendant sought to put in evidence, but which the court below excluded. The father, Daniel Walters, as the result of inquiry he had instituted for his son, who had unaccountably disappeared, received these photographs early in January, 1880. The statement of the daughters, Mrs. Rieffenach and Miss Fannie Walters, is that he brought them home and that their mother was in the room at that time (*Rec.*, 1773-8, 1798); that before the pictures had been shown to her the father accidently dropped one of them on the floor, and that while it was being picked up the mother saw it and exclaimed: "Oh, it is my son!" and immediately fell in a swoon.

Of course, it is understood that this matter is not offered as a voluntary statement by the person, though she was the mother. It is not offered as a "testimonial assertion" (1 Greenleaf's Evidence, Ed. 1899, Secs. 99a, 100, 101) of recognition. It is sought to prove the events that occurred as circumstances proving a state of mind and a mental act of the mother. The daughters, the son and the father *testify* in regular form to the fact of *their* recognition. The involuntary ejaculation and the swoon of the mother are *both* offered as the inevitable concomitants of the mental act of recogni-

tion, all the more conclusive as evidence of that because spontaneous and involuntary. The recognition by the mother, thus proved, is evidence as competent as that by the sisters and brother proved by their testimony. The proof was competent under the rules affirmed by this court on the former appeal in this case; and its exclusion was certainly a grave and material error.

What is proven is the *act of recognition,* and it is proven both by the spontaneous exclamation and by the swooning. As said by this court, these are made all the more conclusive as evidence of their inherent sincerity and the impossibility of collusion in respect of them. (1 Greenleaf's Evidence, 162f, 162g.)

THIRTEENTH SPECIFICATION.—RELATING TO THE EXCLUSION OF CERTAIN EVIDENCE OFFERED BEARING UPON THE CHARACTER AND CREDIBILITY OF THE WITNESS SIMMONS.

The testimony of the witness Simmons, was reserved and theatrically projected into the case almost at the very close of plaintiff's rebutting testimony, and when no time or opportunity could be had for investigation. The testimony is itself of extraordinary character. A cigar-maker of Leavenworth, who for perhaps twenty-five or thirty years had been running an establishment through which flowed a continuous stream of employes, a shifting and wandering class notoriously, assumed to remember and to identify a young man, who, he said, had worked in his shop for a few weeks twenty-one years before, by a photograph taken of that youth some four years before the time of his alleged employment. The athletics of the memory are extraordinary and capricious, but this feat

makes a large demand upon credulity. The character and habits which he ascribes to the Walters whom he employed find no counterpart in any account of the Frederick Walters whom, as we believe, the evidence in this case conclusively shows to have gone with Hillmon and Brown on their last expedition from Wichita, and whose body lay dead by the camp fire at Crooked Creek. Walters was of German race, and the name is common, and there may well have been many persons of similar name, but we strenuously insist that the parents and the sisters and the brother and the sweetheart of the Frederick Walters whose remains were brought to Lawrence were not, and could not have been, mistaken in their recognition and identification of him. There may not have been wilful wrong, but if not, there was assuredly mistake in the testimony of this man Simmons. The offer of one of the counsel for the defendants in the court below to question the character and credibility of this witness brought down upon him instantly, the thundering denunciation of the court (*Rec.*, 1878-9), and so the testimony upon this subject closed and the case was sent to the jury.

Under the pressure of time, and the great bulk of this record, petitioner omitted to formulate, as was intended, a definite assignment of error upon this subject. The attention of the Circuit Court of Appeals was nevertheless directed to this error, although no reference to it was made in the opinion of the court. Under rule 21 this court at its option may notice a plain error not assigned (*U. S.* v. *Penna*, 175 U. S., 500, 502), and we ask that the action of the court below, in this connection, may be considered by this court as upon an independent assignment and specification of error; but in any event that it may be considered in connection with the Fourteenth Specification of Error.

With all the respect due to the situation, we submit that the extravagant language and the unrestrained emphasis of the court were unjust to counsel, even if his claim of right had been without solid legal foundation, and were irremediably injurious to the cause of the defendant. The whole moral weight and influence of the court were thereby lent to give support in the minds of the jury to the character of the witness and the credibility of his statements. The entire proceeding was unjustified by any principle of jurisprudence or method of judicature. When cumulated upon the proceedings presented by the record and by our Fourteenth Specification of Error, it became absolutely impossible that the cause of the defendants could thereafter have an impartial consideration by that jury.

We submit, moreover, that the court below was wholly wrong in its emphatic statement: "There is no line of cases reported in the English language that will justify a question of that character, and the counsel ought to know it." Upon that proposition of the court below we refer to the following:

In *State* v. *Greenburg*, 59 Kan., 404; 53 Pac., 61, the Supreme Court of Kansas said:

> "For the purpose of judging the character and credit of a witness, he may be cross-examined as to specific facts tending to disclose or discredit him, although collateral to the main issue, and touching on the matters of record. Such questions are allowed when there is reason to believe that it will tend to the ends of justice and are asked for the purpose of honestly discrediting the witness."

In *Tla-Koo-Yel-Lee* v. *United States*, 167 U. S., 274, 277, the court below refused to permit counsel for the defendant to ask a witness certain questions relative to her past life, the general tenor of which would cast discredit upon her and

impair the credibility of her testimony. The Supreme Court held these questions were proper and said, by Mr. Justice Peckham:

> "We think answers to all these questions should have been permitted. The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination and obtain answers from the witness to that end."

FOURTEENTH SPECIFICATION.—RELATING TO PREJUDICIAL REMARKS OF THE COURT.

In the course of the trial the court interrupted and suspended the proceedings for the purpose of the remarks shown in the specification of error, and in which the court indulged in the presence of the jury. The declamatory and dramatic character of the proceeding is sufficiently reflected in the record. (*Rec.*, 800-807.) In a forum ringing from morning till night with the clamor of counsel concerning the relative conditions of the plaintiff and defendant; with re-iterated platitude about the poor and helpless woman on the one side and on the other the enormous money-power of wealthy corporations; in an atmosphere reeking with appeals to such vulgar prejudice and antipathies, the implication in the minds of the jury, however impartial the court may have sought to make its language, must have been, not that the plaintiff in her poverty, but the defendants in their opulence were responsible for the offense which the court denounced. After this vivid proceeding before the jury, counsel insisted to the court that it was their firm conviction that *from that time on they could not have a fair trial* nor receive justice at the hands of that jury. (*Rec.*, 805-6.) It cannot be said that the re-

sult rebuked their apprehensions. We beg to refer to the record for the considerations urged upon the court below in support of the motion, which we thereby present in this court upon this specification of error.

FIFTEENTH SPECIFICATION.—RELATING TO REQUESTED DIRECTION TO FIND FOR DEFENDANT.

In support of this specification of error we beg simply to refer the court to the following conclusions which have already been discussed. In argument upon the seventh specification of error we have insisted that it was not competent for the court below in that action at law to hold that the release which was in evidence, and which was set up in the pleading of the defendant, was void for want of consideration. If that be correct, and if that holding was unauthorized, then the release as pleaded constituted a conclusive bar to the action of the plaintiff.

In the argument upon the eighth specification of error we have insisted that the sworn statement or affidavit of John H. Brown, being introduced in evidence by the plaintiff below, was conclusive evidence as to her of the fact therein disclosed, namely, that the body brought from Medicine Lodge of the man shot at Crooked Creek was not the body of Hillmon, and that this statement could not be controverted or impeached by her. If that be so, that consideration is conclusive of the case, and a verdict for the defendant should have been directed by the court.

Upon these grounds and each of them we submit that the judgment should be reversed, and the court below directed upon this record to enter judgment for the defendant.

SIXTEENTH SPECIFICATION.—JUDGMENT ERRONEOUS.

We respectfully submit this final specification of error upon consideration of the errors which have been detailed and upon the whole record which is before the court.

WILLIAM G. BEALE,
Of Counsel for Petitioner.